TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 105.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

LEONARD MATHEWS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED MAY 15, 1894.

(15,588.)

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a The United States of America to Leonard Mathews, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 17th day of May next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The St. Louis and San Francisco Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Francis M. Black, chief justice of the supreme court of the State of Missouri, this 17th day of April, in the year of our Lord one thousand eight hundred and ninety-four.

FRANCIS M. BLACK,
Chief Justice of the Supreme Court of Missouri.

b [Endorsed:] Supreme court of Missouri. Leonard Mathews, defendant in error, *vs.* St. Louis & San Francisco Railway Co., plaintiff in error. Citation. Filed Apr. 24, 1894. Jno. R. Green, clerk.

UNITED STATES OF AMERICA, *ss:*

Supreme Court of Missouri.

I hereby acknowledge due service of the within citation this 17th day of April, A. D. 1894.

JOHN G. CHANDLER,
Attorney for Defendant in Error.

1 The United States of America to Leonard Mathews, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., not exceeding thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The St. Louis and San Francisco Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Francis M. Black, chief justice of the supreme court of the State of Missouri, this 17th day of April, in the year of our Lord one thousand eight hundred and ninety-four.

FRANCIS M. BLACK,
Chief Justice of the Supreme Court of Missouri.

1½ [Endorsed:] Supreme court of Missouri. Leonard Mathews, def't in error, *vs.* St. Louis & San Francisco Railway Co., pl'ff in error. Citation. Filed Apr. 24, 1894. Jno. R. Green, clerk.

UNITED STATES OF AMERICA, *ss:*

Supreme Court of Missouri.

I hereby acknowledge due service of the within citation this 17th day of April, A. D. 1874.

JOHN G. CHANDLER,
Attorney for Defendant in Error.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1893, thereof, between Leonard Mathews, plaintiff, and The St. Louis and San Francisco Railway Company, defendant, a manifest error hath happened, to the great damage of the said The St. Louis and San Francisco Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., in thirty days from date of signing the citation in this cause, in the said supreme court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of April, in the year of our Lord one thousand eight hundred and ninety-four.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court United States,
Western District of Missouri.

Allowed by—
FRANCIS M. BLACK,
Chief Justice of the Supreme Court of Missouri.

2½ [Endorsed:] No. —. United States circuit court, western district of Missouri, central division. Leonard Mathews, def't in error, *vs.* St. Louis & San Francisco Railway Co., pl'ff in error. Writ of error to the supreme court of the State of Missouri. Filed Apr. 24, 1894. Jno. R. Green, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Western District of Missouri,* } ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Seal of the Supreme Court of Missouri.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 1st day of May, A. D. 1894.

JNO. R. GREEN, *Clerk.*

3 In the Supreme Court of the United States.

LEONARD MATTHEWS, Defendant in Error,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, Plaintiff in Error.
} Assignment of Errors.

And now comes The St. Louis & San Francisco Railway Company, plaintiff in error in the above-entitled cause, and states that manifest error hath intervened to its prejudice in the proceedings had in said cause in the supreme court of the State of Missouri, and assigns as such error the following:

First. Said supreme court of the State of Missouri erred in holding as a valid enactment the following act, passed by the legislature of said State of Missouri March 31, 1887, said act being as follows:

"An act to establish the responsibility of railr-ad corporations, companies, and persons owning or operating railroads for damages by fire communicated by locom otive engines."

"Be it enacted by the General Assembly of the State of Missouri as follows:

"SEC. 1. Each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages."

"SEC. 2. The term 'railroad corporation' contained in this act shall be deemed and taken to mean all corporations, companies and individuals now owning or operating, or which may hereafter own or operate any railroad in this State." Approved March 31, 1887.

4 because said act denies to the plaintiff in error the equal protection of the law, contrary to the provisions of sec. 1, art. 14, of the amendments to the Constitution of the United States.

Second. The said supreme court of the State of Missouri erred in holding said last-named act a valid enactment because it deprives the plaintiff in error of its property without due process of law, contrary to the provisions of art. 5 of the amendments to the Constitution of the United States.

Third. Said supreme court of the State of Missouri erred in holding said last-named act a valid enactment because it impairs the obligations of a contract made between the State of Missouri and the plaintiff in error, contrary to the provisions of art. 1, sec. 10, of the Constitution of the United States.

Fourth. Said supreme court of the State of Missouri erred in affirming the judgment against the plaintiff in error.

Fifth. Said supreme court of the State of Missouri erred in overruling the petition of the plaintiff in error for a rehearing in said case.

Wherefore said St. Louis & San Francisco Railway Company prays that the judgment of said supreme court of Missouri may be reversed.

E. D. KENNA,
Attorneys for Plaintiff in Error.

[Endorsed:] In the Supreme Court of the United States. The St. Louis and San Francisco Railway Co., plaintiff in error, *vs.* Leonard Mathews, defendant in error. Assignment of errors. Filed April 24, 1894. Jno. R. Green, clerk.

4½ Be it remembered that heretofore, to wit, on the 25th day of March, 1891, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript in the case wherein Leonard Mathews was respondent and The St. Louis and San Francisco Railway Company was appellant; which said transcript is in words and figures as follows, to wit:

5 STATE OF MISSOURI, } *ss.*:
City of St. Louis, }

Be it remembered that on the 9th day of December, 1887, there was filed in the office of the clerk of the circuit court, city of St. Louis, a petition in a certain cause wherein Leonard Mathews is plaintiff and The St. Louis and San Francisco Railway Company is defendant.

Which petition is in words and figures as follows:

Petition.

CITY OF ST. LOUIS, } ss:
State of Missouri, }

LEONARD MATHEWS, Plaintiff, } In the Circuit Court of the City of St. Louis, February Term, 1888.
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Defendant.

Plaintiff states that during the month of August, 1887, he was the owner and in possession of a certain tract of land, with valuable improvements thereon, situated in St. Louis county, Missouri, bounded on the north by the Missouri Pacific railway, on the south by defendant's railway, on the west by Holmes Ave., and on the east by land formerly of Elizabeth L. Hart; that defendant, a corporation under the laws of Missouri, was the owner and engaged in operating a line of railway adjoining said tract of land on the south side and using locomotive engines upon said railway in operating the same; that on the 9th day of August, 1887, and for a long time prior thereto defendant negligently suffered a large amount of dry grass, weeds, and rubbish to accumulate and remain upon and along its said railway and right of way adjoining said land and used
6 and employed in operating said railway locomotive engines and other machinery that were improperly and negligently constructed, so that sparks of fire could and did needlessly escape from such engines, and that on the said 9th day of August, 1887, by reason of defendant's said negligence and by reason of a locomotive engine then being in use upon the railroad then owned and operated by defendant, fire was communicated to said dry grass, weeds, and rubbish so accummulated on defendant's right of way and extended to plaintiff's said land and destroyed a dwelling-house, barn, outbuildings, trees, shrubbery, and personal property in and upon said land and improvements thereon of great value, to wit, $30,000, to damage of plaintiff in a large sum of money, to wit, in the sum of $30,000, for which he asks judgment, with costs.

And for a second cause of action plaintiff says that during the month of August, 1887, plaintiff was the owner of a certain tract of land and improvements thereon situated in the county of St. Louis and the State of Missouri, the same being more fully described in the first count thereof. Defendant was the owner and operating the railroad adjoining said land on the south side, having locomotive engines in use upon said railroad, and on said 9th day of August, 1887, fire was communicated from a locomotive engine then in use upon said railroad owned and operated by defendant as aforesaid to plaintiff's property on his said land, and thereby a dwelling-house, barn, outbuildings, trees, shrubbery, and personal property in and upon said land and the improvements thereon, and all being property of the plaintiff, were totally destroyed by said fire so communicated, to plaintiff's damage $30,000, for which he asks judgment, with costs.

JOHN G. CHANDLER,
Attorney for Plaintiff.

7 Upon the filing of said petition a summons for the defendant was issued from the office of the clerk of said court, directed to the sheriff of the city of St. Louis, and was by the said sheriff returned duly executed on the 13th day of December, 1887.

And afterwards, at the October term, 1890, of said circuit court, the following proceeding was had in said circuit court, to wit:

LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. } 75423.

TUESDAY, *October* 14*th*, 1890.

Second amended answer filed by leave.
Application for special jury filed.
Which said second amended answer is in words and figures as follows, to wit:

STATE OF MISSOURI, } *ss*:
City of St. Louis, }

LEONARD MATHEWS, Plaintiff,
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Defendant. } In the Circuit Court, December Term, 1889. Amended Answer.

I.

Defendant, for amended answer to the first count of plaintiff's petition herein, admits that during the month of August, 1887, it was a corporation existing under the laws of Missouri, owning and engaged in operating a line of railway adjoining the tract of
8 land in plaintiff's petition described and using thereon locomotive engines in operating the same, and denies each and every other allegation in said first count of plaintiff's petition herein contained.

II.

And defendant, for another and further answer to said first count of plaintiff's petition, avers that the plaintiff has assigned to persons to this defendant unknown his right of action against this defendant, if any he ever had, and is neither a necessary or proper party plaintiff herein, and is not the real party in interest, and is not therefore entitled to maintain or prosecute this action.

II B.

And for another and further answer to said first count defendant says that there is a defect of parties plaintiff in this, to wit, that the Detroit Fire and Marine Insurance Company, the Commercial Union Assurance Company, and the Imperial Fire Insurance Company, and each and every one of these, are parties in interest in this case and are necessary parties plaintiff herein.

III.

Defendant, for further amended answer to the first count of plaintiff's petition herein, avers that on the date and at the time in said petition of plaintiff mentioned there *was* growing and standing upon the property in said petition described, adjacent to and continuous from the right of way from defendant company to the house, shrubbery, and trees of plaintiff in his petition described, large quantities of dry grass, leaves, weeds, and other combustible and highly inflammible matter which were carelessly and negligently allowed to grow and accumulate upon said premises in said petition described by and with the knowledge and consent of the plaintiff herein; that
9 the accumulation of dry, combustible, and highly inflammible matter as aforesaid has been carelessly and negligently allowed to remain upon said premises for a long time prior to the 9th day of August, 1887, to wit, for many years; that it was gross negligence of plaintiff to so allow said dry and combustible matter to accumulate and remain upon his said premises without taking precautions to prevent the spread of fire, which might accident-ly be set on fire upon the right of way of defendant railway company or which might accident-ly escape from passing engines.

Wherefore defendant says that the plaintiff in this case was guilty of negligence, which it further avers did proximately and directly contribute to the injuries of which he complains.

IV.

For a further amended answer to the first count of plaintiff's petition herein, defendant avers the fact to be that the said dwelling-house, barn, and outbuildings in said petition described were, on the 9th day of August, 1887, insured in the Detroit Fire and Marine Insurance Company, Commercial Union Assurance Company, and the Imperial Insurance Company, doing business in the State of Missouri; that said insurance was for the aggregate sum of $10,000, which defendant avers was greatly in excess of the real value of said dwelling-house, barn, and outbuildings.

That said insurance companies, after the fire in plaintiff's petition alleged, paid to the said plaintiff the sum of $10,000 on account of the loss sustained by reason of the burning of said dwelling-house, barn, and outbuildings as aforesaid.

Wherefore defendant says that the sum so paid to plaintiff by the said insurance companies as aforesaid should be applied *pro tanto*
to the satisfaction of plaintiff's claim, if any he has, which
10 defendant denies.

I.

Defendant, for amended answer to the second count of plaintiff's petition herein—

Admits that on the 9th day of August, 1887, it was the owner of and operating a railroad adjoining the land in said second count of plaintiff's petition herein set forth, and denies each and every other allegation in said second count of plaintiff's petition herein contained.

II.

And defendant, for another and further answer to the said second count of plaintiff's petition, avers that the plaintiff has assigned and transferred to persons to this defendant unknown his right of action against this defendant, if any he ever had, and is not a necessary or proper party plaintiff herein and is not the real party in interest, and is not therefore entitle- to maintain or prosecute this action.

II B.

And for another and further answer to said first count defendant says that there is a defect of parties plaintiff in this, to wit, that the Detroit Fire and Marine Insurance Company, the Commercial Union Assurance Company, and the Imperial Fire Insurance Company, and each and every one of them are parties in interest in this case, and are necessary parties plaintiff herein.

III.

Defendant, for further amended answer to the second count of plaintiff's petition herein, avers that on the date and at the time in said petition of plaintiff mendioned there *was* growing and
11 standing upon the property in said petition described, adjacent to and continuous from the right of way of defendant company to the house, shrubbery, and trees of plaintiff in his petition described, large quantities of dry grass, leaves, weeds, and other combustible and highly inflam-able matter which were carelessly and negligently allowed to grow and accumulate upon the said premises in said petition described by and with the knowledge and consent of the plaintiff herein; that the accumulation of dry, combustible, and highly inflam-able matter as aforesaid had been carelessly and negligently allowed to remain upon said premises for a long time previous to the 9th day of August, 1887, to wit, for many years; that it was gross negligence for plaintiff to so allow said dry and combustible matter to accumulate and remain upon his said premises without taking precautions to prevent the spread of fire which might accident-ly set out upon the right of way of defendant railway company or which might accident-ly excape from passing engines.

Wherefore defendant says that the plaintiff in this case was guilty of negligence, which it further avers did proximately and directly contribute to the injuries of which he complains.

IV.

And for further amended answer to second count of plaintiff's petition herein defendant avers the fact to be that the said dwelling-house, barn, and outbuildings in said petition described were on the 9th day of August, 1887, insured in the Detroit Fire and Marine Insurance Company, Commercial Union Assurance Company, and the Imperial Fire Insurance Company, doing business in the State

of Missouri; that said insurance was for the aggregate sum
12 of $10,000, which defendant avers was greatly in excess of the real value of the said dwelling-house, barn, and outbuildings; that the said insurance companies, after the fire in plaintiff's petition alleged, paid to the said plaintiff the sum of $10,000 *of* account of the loss sustained by plaintiff by reason of the burning of said dwelling-house, barn, and outbuildings aforesaid.

Wherefore defendant says that the sum so paid to plaintiff by the insurance companies as aforesaid should be applied *pro tanto* to the satisfaction of plaintiff's claim, if any he has, which defendant denies.

V.

Defendant, for a further amended answer to the said second count, avers that the alleged cause of action therein set forth is founded upon an act of the legislature of the State of Missouri entitled "An act to establish the responsibilities of railroad corporations, companies, and persons owning or operating railroads for damages by fire communicated by locomotive engines," approved March 31, 1887, which act defendant avers is illegal, unconstitutional, and void, in that it seeks to deprive the defendant of its property without due process of law and contrary to the provisions of section 30, article 2, of the constitution of the State of Missouri.

VI.

Defendant, for a further amended answer to the said second count of plaintiff's petition herein, avers that the alleged cause of action therein set forth is founded upon an act of the legislature of the State of Missouri entitled "An act to establish the responsibilities of railroad corporations, companies, and persons owning or operating railroads for damages by fire communicated by
13 locomotive engines," approved March 31st, 1887, which act defendant avers is illegal, unconstitutional, and void, in that it denies the defendant the equal protection of the laws, contrary to the provisions of section 1, article 14, of the amendments of the Constitution of the United States; and defendant further avers that said law was illegal, unconstitutional, and void in this, that it deprives defendant of its property without due process of law, contrary to the provisions of article 5 of the amendment of the Constitution of the United States.

And defendant further avers that said law is illegal, unconstitutional, and void for the reason that it implies the obligations of a contract made between the State of Missouri and defendant, by the terms and provisions of which it was impliedly agreed that said defendant might and could use fire for the purpose of generating steam to propel said locomotive engines and cars attached thereto and be responsible only for the negligent and careless use thereof, and is contrary with the provisions of article 1, section 10, of the Constitution of the United States.

VII.

And for another and further answer to said second count defendant states that heretofore, to wit, on the — day of June, A. D. 1882, the plaintiff was the owner of the land described in his petition and also of a certain strip of land along and adjacent to the west side of said tract one hundred feet wide, being the same strip of land now occupied by defendant's road-bed and right of way, and that defendant was then desirous of building its road upon said strip.

That plaintiff and defendant could not agree as to the amount of compensation to be paid to plaintiff for said strip and de-
14 fendant commenced proceedings in the circuit court of St. Louis county, Missouri, against the plaintiff, the general object and nature of which was to condemn a right of way upon said strip and through and along plaintiff's said land.

That commissioners were duly appointed by said circuit court of St. Louis county, before whom the matter of compensation of plaintiff was to be heard, and before whom was then and there pending, amongst other things, the question of how much compensation plaintiff should receive from defendant:

1st. For actual amount of ground taken.

2nd. For the injury to the property as a place of residence caused by running the road where it now runs.

3rd. For cutting up or dividing the property then owned by the plaintiff into detached portions.

4th. For danger by fire for all time to come.

That thereafter, to wit, on the — day of July, A. D. 1890, the said matter- so pending before said commissioners were all compromised and settled between plaintiff and defendant upon the agreement that in consideration of all of said matters the defendant should pay plaintiff the sum of nine thousand dollars in full payment, settlement, accord, and satisfaction of said right of way and said strip of land, and all the matters and things so pending before said commissioners as aforesaid.

That thereafter, to wit, on the 15th day of July, A. D. 1882, defendan*d* for the consideration aforesaid paid to said Leonard Mathews and said Leonard Mathews received from the defendant the said sum of nine thousand dollars pursuant to and in compliance with said contract and agreement.

Wherefore defendant says the plaintiff ought not to prosecute or maintain said cause of action in said second count of action
15 set out, and defendant, having fully answered, asks to be discharged with its costs.

E. D. KENNA,
Att'y for Def't.

L. F. Parker, being duly sworn, states that on October 13th, A. D. 1890, he delivered a copy of the above and foregoing amended answer to John G. Chandler, attorney of record for the plaintiff herein, at his office, in the city of St. Louis, Mo.

L. F. PARKER.

Subscribed and sworn to before me this 13th day of October, 1890.

A. R. DILLON,
Notary Public.

[SEAL.]

Term ends June 23rd, 1894.

And on the 14th day of October, 1890, a reply to the second amended answer was filed in said cause and is in words and figures as follows, to wit:

LEONARD MATHEWS, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, Defendant.
} In the Circuit Court of the City of St. Louis, October Term, 1890.

And now comes the plaintiff and for reply to defendant's second amended answer herein says he denies each and every allegation of new matter in said answer contained.

JOHN G. CHANDLER,
Attorney for Pl'ff.

16 And afterwards, at the said October term, 1890, of said circuit court, the following further proceedings were had in said cause, to wit:

LEONARD MATHEWS
vs.
ST. LOUIS — SAN FRANCISCO RAILWAY COMPANY.
} 75423.

WEDNESDAY, *October 22nd*, 1890.

Now, at this day, come the said parties, by their respective attorneys, and also come a jury, to wit, Clarence B. Beck, Joseph T. Dugdale, Andrew J. Child, George H. Duncan, Olive L. Dolton, B. G. Chapman, James T. Gill, Charles Champbell, Walter T. Dixon, Louis P. Flaven, Hugh T. Brey, and Walker Evans, twelve good and lawful men, who being duly elected, tried, and sworn the issues herein joined well and truly to try and a true verdict render according to the law and the evidence, whereupon the hearing of this cause is ordered to be laid over until tomorrow morning at 10 o'clock a. m.

LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY.
} 75423. Motion to Require Plaintiff to Elect Filed.

FRIDAY, *October 23rd*, 1890.

Now, again at this day, come said parties, by their respective attorneys, and also come the jury heretofore duly sworn and impanelled, herein, and thereupon the trial of this cause progressed, and, not being terminated at the hour of adjournment, is continued until tomorrow morning.

17 LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. } 75423.

SATURDAY, *October* 24*th*, 1890.

Now again at this day come said parties, by their respective attorneys, and also come the jury heretofore sworn and impaneled herein, and thereupon the trial of this cause progressed, but not being terminated at the hour of adjournment, it continued until Monday morning next at half past ten o'clock a. m.

LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. } 75423.

MONDAY, *October* 27*th*, 1890.

Now again at this day come said parties, by their respective attorneys, and also come the jury heretofore duly sworn and impaneled herein, and the trial of this cause progressed, but, not being terminated at the hour of adjournment, is continued until tomorrow morning.

LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. } 75423.

TUESDAY, *October* 28*th*, 1890.

18 Now again at this day come said parties, by their respective attorneys, and also come the jury heretofore duly sworn and impaneled herein, and the trial of this cause progressed, and thereupon defendant files a motion to require plaintiff to elect between the counts of the petition herein, and the court, having heard and being advised thereof, doth overrule said motion, and the trial, not being terminated at the hour of adjournment, is continued until tomorrow morning.

LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. } 75423.

WEDNESDAY, *October* 29*th*, 1890.

Now again — the parties and jury as aforesaid, and thereupon the trial of this cause progressed, and, not being fully terminated, is continued until tomorrow morning.

LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. } 75423.

THURSDAY, *October* 30*th*, 1890.

Now again come the parties and jurors as aforesaid, and the trial of this cause progressed, and, not being fully terminated, is continued until tomorrow morning.

LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. } 75423.

FRIDAY, *October* 31*st*, 1890.

19 Now again come said parties and jurors aforesaid, and the trial of this cause progressed, and thereupon the defendant files a motion to require plaintiff to elect between the counts of the petition herein, and the court, having heard and being fully advised thereof, doth sustain said motion; and thereupon the plaintiff elects to stand on the second count of his petition, and it is ordered by the court that the cause be submitted to the jury upon the issues joined on said second count only, and, the evidence having been all heard, the jury retire to consider of their verdict.

LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. } 75423.

SATURDAY, *November* 1*st*, 1890.

Now again at this day come the parties, by their respective attorneys, and also come the *the* jury heretofore duly sworn and impaneled herein. The said jury having agreed upon a verdict, upon their oaths say they find in favor of the plaintiff and assess his damages at the sum of eleven thousand dollars. It is therefore considered by the court that the plaintiff recover of the defendant the damages aforesaid in form aforesaid *as* assessed, and also his costs and charges herein expended, and have execution therefor.

Verdict and instructions filed.

LEONARD MATHEWS
vs.
ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY. } 75423.

WEDNESDAY, *Nov. 5th*, 1890.

Motion for new trial filed.

Motion in arrest filed.

20 LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. } 75423.

SATURDAY, *November* 29*th*, 1890.

It is ordered by the court that the motion in arrest of judgment and the motion for a new trial heretofore filed herein be continued. Pursuant to stipulation this day filed herein, it is ordered by the court that the defendant herein have time until the last day of the December term, 1890, to file its bill of exceptions herein; and afterwards, at the December term, 1890, of said circuit court, the following further proceedings were had in said cause, to wit:

LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. } 75423.

MONDAY, *December 15th*, 1890.

It is ordered by the court that the motion heretofore filed and submitted herein for a new trial be overruled; it is ordered by the court that the motion heretofore filed and submitted herein in arrest of judgment be overruled.

LEONARD MATHEWS
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. } 75423.

FRIDAY, *January 30th*, 1891.

21 Now at this day the defendant comes, by its attorney, and presents to the court its bill of exceptions, which is allowed, signed, sealed, and filed and made a part of the record herein. It thereupon files an affidavit for an appeal, and on its motion an appeal is allowed it to the supreme court of the State of Missouri from the judgment in this cause rendered.

Appeal bond approved and filed.

Which bill of exceptions, affidavit, and bond are respectively in words and figures as follows, to wit:

STATE OF MISSOURI, } *ss*:
City of St. Louis, }

LEONARD MATHEWS, Plaintiff,
vs.
THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Defendant. } In the Circuit Court.

Bill of Exceptions.

Be it remembered that on the 22nd day of October, 1890, this cause came on to be heard upon the pleadings before a jury and the following proceedings were had. Before the introduction of any evidence the defendant objected to the introduction of any evidence upon the grounds—

1st. That the petition herein does not state a cause of action.

2nd. That in the first count the plaintiff has not specifically pleaded.

3rd. That he has combined two causes of action in one count involving different rules of evidence and different measures of damage.

4th. That the law on which the second count is based is unconstitutional.

Which objections were by the court overruled; to which ruling the defendant excepted at the time.

22 Defendant then filed the following motion to require the plaintiff to elect between the counts in his petition:

STATE OF MISSOURI, } ss:
City of St. Louis, }

LEONARD MATHEWS, Plaintiff, } In the Circuit Court, October Term, 1890.
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Defendants.

Motion to quire Plaintiff to Elect.

Defendant moves the court to require plaintiff to elect between the counts in his said petition, and for reasons therefor says:

I.

That the measure of damages in said alleged causes of action in said petition set forth are totally different, and—

II.

That a different and not the same proof is required to support each of the said alleged causes of action.

KENNA, PARKER AND SHERWOOD,
Attorneys for Defendant.

Which motion was by the court overruled; to which ruling the defendant excepted at the time.

And plaintiff, to sustain the issues on his part, introduced as a witness PATRICK DORSEY, who testified as follows, viz:

I live in East Kirkwood, about one-half mile northwest of the property of plaintiff which was burned; have worked for plaintiff off and on for twenty years or more.

For about twelve years I worked regularly; since that I worked for him some and for myself some; worked for the past few
22½ years a month or so in the spring and a month or so in the fall of each year. I trimmed the hedges, mowed the lawn, raked and burned the leaves, and did other work when told to. The hedges were Osage orange and was a good hedge. I worked on the place the day of the fire, mowing weeds next to the railroad near west end of place. Some time after dinner I saw a freight train pass on the San Francisco railroad, going east, and shortly after it passed I heard a boy cry fire, and looked and saw the smoke, which appeared to be close to the railroad and near the east end of Mathews' place. There was weeds and hay along there, outside of Mathews' place, on the right of way, and the wind was from the south or southeast and blew the fire north or northwest, right towards and into the Mathews place; could not see the fire on the ground at first, but only the smoke. There was a ridge running north and south through the Mathews place, about the middle, and this ridge runs across the railroad. Through this ridge the railroad had made a cut east and west. I was west of the top of this ridge and the fire commenced east of it. This cut is about twenty feet.

When I heard the boy cry fire and saw the smoke I went towards it and saw some of those weeds and hay that were moved on the right of way on the railroad right of way on fire. The leaves and blossom caught fire and were carried by the wind over into Mr. Mathews' meadow, and it caught fire. When I got there, there was fire on the right of way and inside the Mathews place, too. I went towards the barn, and when I got there it was so hot I could not go into the barn.

The meadow was mown and the hay was hauled away. When I got to the barn I got a bucket and started after some water to try and save the barn, but it was impossible to do so; the fire
23 came too rapidly. I saw it strike the shed and burn it and the barn. I then tried to wet the grass between the house and the barn, but it did no good; the sparks and burning shingles from the barn soon set the house, and that burned, too.

There was an Osage-orange hedge all around the place, and there was an Osage-orange hedge separating the garden from the lawn, and one separating the vineyard from the garden. The fire went through all this hedge and burned most of it. There were about eleven or twelve acres in Mathews' place. There were many evergreen trees, Norway pine, hemlock, spruce, Scotch pines, white pines, sabina, and some juniper trees; also horse chestnut, two kinds of poplar, maples, Australian cypress, and a large variety of flowers, bearing shrubs, magnolies, alphis, flowering almond, snowballs, and a shrub they called the burning bush. There was a variety of ornamental trees and shrubs, and the greater part of all these were killed, destroyed by that fire. The barn was a big barn and had a bowling alley in it. It was two stories high and had an elevated place to drive into the second story. The cellar of the house had a concrete floor and a furnace and gas and water pipes and fixtures and gas tank. There was also a water tank in the top of the house over the kitchen. This house and all was destroyed by fire. After the fire I went down and examined, and marks of fire were to be seen all the way from the track of the railroad up to and past the barn and to and past the house. This fire occurred Aug. 9, 1887.

And on cross-examination said witness testified that portions of the Mathews place—that consisting of the lawn, meadow, and trees and vines near the house—had been carefully tended and
24 plowed each year, while other portions—the nursery, garden, orchard, and vineyard remote from the house—had not been so carefully tended, and more or less weeds or grass had accumulated there; that immediately next the right of way where he first saw the smoke was the nursery; then next north of this the vineyard; then north and west of them the barn yard and barn; then northwest of them a lawn, and then came the house, and that was the course taken by the fire; that the summer season of 1887 was very dry; everything "was dry, very dry;" that shortly before the fire he had mowed the lawn and the meadow around and southeast of the barn reaching down to the railroad property and had hauled away the hay.

And plaintiff, LEONARD MATHEWS, being introduced as a witness in his own behalf, testified as follows:

I am the *plaintiff* of the property referred to in this case; 11.46 acres constitute what is known as my home place. It was bounded on the north by the Missouri Pacific railroad, on the east by the Anderson property, on the south by Elliott avenue and the St. Louis and San Francisco railroad, and on the west by Homes avenue. The home place was surrounded by an Osage-orange hedge except upon the north, about 2½ acres south of Elliott avenue, between the home place and the Frisco railroad track. This piece of land is — feet wide at the west end, on Homes avenue, and runs nearly to a point at the east end, is the shape of a flat-iron, bounded on the west by Homes avenue, on the north by Elliott avenue, and on the south by the Frisco railroad track. Besides the hedge around the place there was a lane from the barn to Elliott avenue formed by a hedge of Osage orange on either side. The barn, which was
25 — on August 9th, 1887, was 75 feet long by 30 feet wide, and in addition there was a cow shed 15 feet by 30 across the end. From the barn to Elliott avenue is 111 feet. From there directly south to the Frisco railroad track is 175 feet to 200 feet. From the house to the barn is 120 feet. The house was north of the barn. The land was flat around the house and sloped from there southeast to where the railroad track crossed Elliott avenue. There was a cut about midway of 25 to 30 feet at its deepest point, sloping in either direction. The house which was on the home place in 1887 had 19 rooms. The main building was built of concrete, and the back building of frame matched to look like stone. The concrete was stuccoed and lined off to look like stone. It looked like a stone house. The corners were raised and embossed. The basement was floored with concrete, except one room, which had plank floor. There were four rooms in the basement and under the back building where a bath-room, coal bin, and wood shed. In this basement were a furnace and a bath-room and fixtures and a gas machine. The machine was for gasoline gas and gas fixtures were all over the house. On the first floor of the house were six rooms with closets and pantries. On the second floor were six or seven rooms. The ceilings in this story were high and the building was first-class and everything in good order. The barn was constructed of wood, with heavy timbers, two stories high. It had two large folding doors and above them another door for throwing hay into the barn. There was a raised driveway on the outside leading to the second story so a load of hay could be driven into the second story without unloading it. The barn was well finished on the inside,
26 with stalls for horses, and there was also a shed for cows. Along the north side of the barn and under the same roof was a bowling alley the full length of the barn. This was ceiled above and on the side with matched and beaded lumber. This was provided with runs, a pit, seats, lamps, stove, and so forth. There was also in the pond or lake a boat-house, and on its edge an ice-house. (Here the jury were shown several photographs and the witness continued:)

There photographs were taken in 1884 or 1885 and correctly represent the place before the fire, which occurred on August 9th, 1887. The barn cost something over two thousand dollars. The improvements I put on the house cost me between six and seven thousand dollars. After I bought the place I laid off the grounds—laid out and made walks and drives—planted shrubbery, evergreens, perennial plants and trees, and everything that was ornamental in the way of shrubbery and plants. This was done in a systematic way and substantially according to plans furnished by a landscape gardener. I planted maple trees—sugar maples, soft maple, and white maple—magnolias, tulip trees, hydrangias, and European linden or lime trees, and nearly every evergreen that grows—Austrian pine, Scotch pine, white pine, Norway pine, decidious cypress, and had also quite a variety of savinas, junipers, and arbavitaes. I also had weeping willows and a large number of fruit trees, consisting of apple, peach, pear, plum, cherry, apricot, nectarines, and crab apple; also raspberry, blackberry, and other small fruit vines. I also had silver maple, spruce, jinko or cotton hair, Lombardy poplars, pina sabina, horse chestnut, Irish junipers, azeleas, catalpas, lila-s, clemates, St. John's wort, smoke-bush, the white fringe, and four or five varieties of honeysuckle and nearly every vine that would grow. A large portion of these had been growing
27 from fifteen to seventeen years and were in good condition.

Many hundred of these trees and shrubbes were destroyed by fire on August 9th, 1887. I lived on this place from 1869 to 1880, when I removed to St. Louis. When I moved I left a man named Cleary in charge of the place, He lived in the back part of the house. He lived there till I rented the place to Mr. Wright in September, 1883 or 1884. Mr. Wright lived there one year, since which time the place had been vacant, except that some member of my family would go out once in a while and sometimes stay all night and sometimes stay a week or two at once. There was sufficient furniture left there for that purpose. While Cleary was there he had charge of the premises and kept them in repair. While Mr. Wright was there he did the same, and since then Dorsey has done what he has done under my directions. Up to the time of the fire the hedges, trees, and shrubbery were in first-class condition. The first I heard of the fire was about three or four o'clock in the evening it occurred. I went right out there. I found the house and barn entirely destroyed. Many of the bushes, trees, and shrubs were destroyed, and many of those that were left were so scorched as to be worthless, so that for ornamental purposes they were, I might say, a total loss. I went down to the track of defendant and found where the fire had burned ten or fifteen feet near the track. The grass near the track was standing, but was short; further back it had been mown and was lying down. This was in railroad property. From this place where I saw the marks of fire near the track the marks of fire spread out as it went northward wider and wider to nearly the whole of my place. The hedges were all ruined.
28 The fire went through the vineyard and ruined many of the vines.

And plaintiff was asked this question:

Q. What personal property, if any, Mr. Mathews, was destroyed at the time?

To which defendant objected because incompetent, irrelevant, and immaterial and because the plaintiff is not entitled to recover from personal property destroyed, especially under the second count; which objection was by the court overruled; to which ruling the defendant excepted at the time, and plaintiff answered said question.

A. There was a lot of bedding and chairs and a table and a lot of things we kept in the house and a lot of books and papers accumulated for many years past, a lot of bowling-alley apparatus, a lot of lamps and stoves and gasoline fixtures, a carriage, some panes of glass, plows, harrow, cultivator, stoves, bed clothes and bedding, tableware, and gasoline machine, all of the value of about five hundred dollars, which was destroyed by fire.

I had plans and specifications made of the house, and they were correct. After the fire I had the shrubbery, trees, and plants that had been destroyed *and* appraised. A fair value of that house as it stood before the fire is $15,000 to $16,000. A fair value of the barn as it stood before the fire is $2,000 to $2,200, and a fair valuation of the water-closet as it stood the day before the fire is $75.00.

And on cross-examination defendant showed by the plaintiff that certain condemnation proceedings, to which the parties in this action were both parties, were had when the St. Louis and San Francicso railroad was built through that property, and offered to
29 prove by the witness that in those proceedings the commissioners assessed the damages to the property of the plaintiff at nine thousand dollars, and that the parties agreed to abide the decision of the commissioners, and the question of damages to the premises in question, by reason of accidental fire, which might thereafter be set out by the engines of defendant was finally settled and compromised by the payment to him of the amount of that finding, and that the settlement and compromise was based upon the action of those commissioners; to which —, by counsel, objected because such evidence was immaterial and irrelevant; which objection was by the court sustained and said evidence excluded; to which ruling the defendant excepted at the time; and defendant also offered to show in cross-examination of the plaintiff that the house and barn of plaintiff which *was* destroyed by fire *was* insured in the Detroit Fire and Marine Insurance Company, the Commercial Union Insurance Company, and the Imperial Fire Insurance Company for the aggrigate sum of thir- thousand dollars, and that said insurance companies had paid the said sum in full to the plaintiff on account of said fire, and that said insurance was placed upon the plaintiff'- property prior to Janurary 1st, 1887; to which plaintiff objected because the same was irrelevant and immaterial; which objection *were* by the court sustained and said evidence excluded; to which ruling defendant excepted at the time.

Witness was here shown a statement addressed to Messrs. Hough, Essex, and O'Bear, commissioners, and was asked if he had ever seen it before and, if so, when and under what circumstances, in answer to which plaintiff testified that he would not be positive, but he thought this was a statement which he (plaintiff) had
30 prepared and either delivered or read to Messrs. Hough, Essex, and O'Bear, commissioners, while they were appraising the damage caused to his property by the location of the defendant's road over and through it.

Plaintiff further testified that he bought the property known as the Home place in 1868 and paid ten thousand dollars for it at bankrupt sale, and that he had sold the property in 1889, after the fire, for $9,000, and that he had made no improvements thereon since the fire.

And plaintiff introduced as a witness Mrs. M. L. HARRISON, who testified that on the 9th day of August, A. D. 1887, she was at the residence of Mr. J. G. Chandler, on the south side of the track of the St. L. and S. F. R'y Co., opposite the home place of Mr. Mathews, the plaintiff; that on the afternoon of that day, about half past one or two o'clock, she saw a freight train go east, and shortly after she heard the boys call fire and went out and saw the smoke going up the bank from the railroad entering Mr. Mathews' place.

The fire swept on through the low grounds. I saw the flame and smoke pass to the barn, and saw it burn and fall and the house catch. There was considerable wind, and I think it was blowing west of north.

And plaintiff called as a witness ALBERT CHANDLER, who testified as follows:

I was at home, south of the railroad, opposite Mr. Mathews' place, on the day of the fire. It started near where Elliott avenue crosses the railroad and swept up the *rial*road bank there and caught the Mathews barn and burned it down, and the shingles flew
31 from the barn and burned the house. After the fire I went down and saw ashes on the track and saw where the fire had burned up the bank. I stirred the ashes, and there were a few coals. When I first observed the fire it was coming up the railroad bank.

And plaintiff introduced ALBERT WALDBART and CAREW SAUNDERS, expert market gardener, who had been familiar with the home place of plaintiff, who testified that the place was tastefully arranged and when they saw it well kept around the house; that there was a large variety of shrubs, plants, and trees there, and that they were very valuable; that many of the evergreens were worth $50.00 apiece, and that the total value of the shrubs, plants, and trees and vines destroyed by the fire was between $6,000 and $7,000; that he made an examination and estimated the value of the trees, shrubs, and plants destroyed shortly after the fire.

CHARLES COMMON and CAREW SAUNDERS testified that shortly after the fire they, with A. Walbart, examined the premises and made a list of the trees, shrubs, plants, and hedge destroyed and the value of each, which was correct and true when made, but they could not state the details from memory, even though refreshed by the list, which was produced and shown to them and identified by them.

On objection of defendant the court ruled that the contents of the list containing more than a thousand items could not be given in evidence or read to the jury; to which plaintiff except-.

And plaintiff introduced witnesses showing that shortly before August 9th, 1887, he had caused the house destroyed to be repaired and put in good shape for occupancy; that he also did repairing in the house in 1886.

The plaintiff introduced as a witness Mr. A. H. KIRCHNER,
32 who had made plans and specifications of the house and barn destroyed. These were made after the fire from measurements and examination of the foundation and walls and from inspection of the photographs in evidence and from information received from the plaintiff and from having seen the house in passing on the road, and — testified that the house and barn were worth twenty thousand dollars—the house seventeen thousand and the barn three thousand dollars.

And SAMUEL K. HARDING, a witness called by plaintiff, testified that on August 9th, 1887, he was a brakeman in the employ of defendant; that on that day he was braking on a freight train which was called the "Hoodlum" and which passed plaintiff'- place about two o'clock in the afternoon, and when it passed there he was in the rear part of the train, and as he passed he saw some grass on fire on defendant's right of way opposite the Mathews place and about 6 or 8 feet from the ends of the ties, on the bank, in the cut; this fire was about two feet across; that the engine pulling the train was engine No. 155 and the engineer was George Langenbacker. The engine gave out a great many sparks. I had noticed before that she gave out sparks. I had been running on that train since the first of August.

And plaintiff introduced as witness- JOSEPH FRANKLIN, ENOS CLARK, and GEORGE M. WRIGHT, who testified that they were familiar with the property of plaintiff known as the Home place and were acquainted with it prior to the time of the fire, in August, 1887; that in their judgment the house was worth from $15,000 to $20,000 before the fire; that the barn was worth about $2,000
33 before the fire, and that the entire place was worth from $21,000 to $30,000 before the fire.

GEORGE M. WRIGHT testified that he saw the premises shortly after the fire, and it was then "a total wreck." He had lived in the house one year from September, 1884, to September, 1885.

Several other witnesses testified to the great beauty of the place before the fire and its good condition, and that the grass had all been mown around the house and barn and hauled away before the fire.

This was all the evidence offered by plaintiff in chief.

And defendant again presented its motion to require plaintiff to elect on which count he would ask a verdict; which motion was again overruled; to which ruling defendant excepted at the time.

And thereupon defendant demurred to plaintiff's evidence for the reason that under the same plaintiff was not entitled to recover upon the first count of his petition nor upon the second count of said petition, as the evidence introduced failed to establish a cause of action against defendant upon either of said counts.

Its demurrer was overruled and it excepted at the time.

And defendant introduced as a witness JOHN BURNS, who testified that he was train-dispatcher on that division of defendant's road running along the Mathews place in August, 1887; that it was his duty to dispatch trains and control them directly meeting points and to know and record the time at which each train passed every telegraph station; that the record then kept is known as a train sheet; that by use of a time-card of any particular date and his train sheet he can tell the number and class of every train which moves on his division of that day, and the time it passed any
34 telegraph station, and on being handed a train sheet identified it as being the train sheet of said division for August 9th, 1887; that it was in his handwriting and was a correct record of the movements of all trains which moved in that division on that day. Witness also identified a time-card as the one in force on defendant's road on August 9th, 1887, and, referring to both said time-card and time-sheet, said witness testified that the only freight train which ran east past the Mathews place between the passage of train number eleven going west and train number 14 going east was a special freight train known as the Hoodlum, which passed the Mathews place about 2.10 p. m.; that train number eleven, running west, passed there about 1.15, and number fourteen, running east, passed there about 2.34 p. m.; that engine number 155 was the engine of said train called the Hoodlum.

Defendant then proved by the train crew of number 11 that there was no fire to be seen at or near the Mathews place when they passed there at 1.15 p. m. August 9th, 1887, and also proved by the crew of number 14 that when they passed there at 2.34 that day the fire was burning fiercely, and had already reached the barn.

Defendant introduced WALTER MEDAIRY, who testified that he had seen Patrick Dorsey, witness for plaintiff, burning brush and weeds on Mathews' home place on the day of and prior to the fire.

Defendant also introduced evidence tending to show that the grass on its right of way had been closely mown all along Mr. Mathews' place, and the cut grass and weeds removed between August 1st and

August 8th, 1887, and that on August 9th there was no inflammable material on said right of way.

Defendant introduced as witnesses two architects, each of whom testified that a house like that of Mr. Mathews could be built
35 for $8,500, and gave in support of their evidence itemized estimate on which said evidence was based, and that such a barn as Mr. Mathews' could be rebuilt for $1,500.

Defendant proved by GEORGE LANGERBACHER, engineer of engine No. 155, that his engine was inspected three days before the fire of August 9th, 1887, and that its cone, netting, and ash pan and all its appliances for preventing the escape of fire were then in good order; that the netting used was the standard netting such as was in use on all first-class engines, both as to size of wire and closeness of mesh; that on the morning of August 10th his engine was again inspected by himself, J. P. Eddy, round-house fireman; David Hughes, inspector of cars for the Union Depot Company, and Mr. McCord, a machinist, and was then in good condition.

J. P. EDDY, DAVID HUGHES, SAMUEL HAMBLEY, and THOMAL H. MCCORD, each being a machinist and expert, testified that they made a thorough examination of said engine No. 155 on the morning of August 9th, and that said engine was in first-class condition; that its cone and netting and all appliances for the prevention of the escape of fire were in good repair and proper construction; that its appliances were of the most approved construction for the prevention of the escape of fire and sparks.

Defendant then called as a witness HOWARD BLOSSOM, who testified that he was an insurance agent, and had been for years, and defendant offered to proof by Howard Blossom that he was agent of the Commercial Insurance Company of Detroit, the Fire and Marine Insurance Company, and the Imperial Fire Insurance
36 Company, and which were carr-ing insurance on the house and barn of Mr. Mathews, which was destroyed by fire on August 9th, 1887, and that he had paid in case to the plaintiff ten thousand dollars on account of the loss sustained by him on account of the fire, being the same fire and loss named in the petition; to which plaintiff objected as irrelevant and immaterial; which objections were by the court sustained and said testimony excluded; to which ruling defendant excepted at the time.

And defendant also offered to prove by the witness HOWARD BLOSSOM that trees, shrubs, plants, and vines were by their inherent nature not susceptible of insurance, and that it is impracticable from a business standpoint to insure such class of property and why it was so impracticable.

To all of which plaintiff objected because irrelevant and immaterial: which objections were by the court sustained and said testimony excluded; to which ruling the defendant excepted at the time.

And defendant introduced LOUIS ARMENTROUT, JAMES M. HOULEHAN, WILLIAM WALKER, PAUL MEYER, CHARLES HOCKER, THOMAS BATES, MICHAEL MURPHY, AUGUST HEGE, GEORGE VAN SICKLE, each of whom lived in the neighborhood of the Mathews home place, and each of whom testified that said place had been neglected for years prior to August 9th, 1887, and no care taken of it except to mow the meadow and lawn around the house. The *the* garden, vineyard, nursery, and orchard had been permitted to grow up in weeds, some of which were two or three years old, and were on that day very dry.

That the said place was a common resort for boys and loafers, who frequented the place in summer to swim in the pond and in the fall to hunt; that it was vacant and open so any one
37 could come and go at will, and that these weeds and inflam--able material at the southeast corner near the nursery ran right down to the right of way of defendant.

And defendant called as witness- A. S. MERMOD, JOHN W. WILSON, JOHN W. ANDREWS, Prof. E. A. HAIGHT, DAVID M. GRISSON, N. H. ALLEN, and W. B. SWAM, each of whom testified that he lived near the plaintiff'- place known as the Home place; that they were familiar with value of property in that vicinity; that the said property was worth from $12,000 to $15,000 before the fire of August 9th, 1887.

H. W. HOUGH, a witness for the defendant, testified that about 1882 he was a commissioner appointed by the circuit court of St. Louis county to assess the damages in condemnation proceedings of St. Louis and San Francisco Railway Company against Leonard Mathews, caused by running the road of said company through his property.

I was then and am now and have been for many years acquainted with that part of plaintiff'- property known as the Home place, and have been for a long time well acquainted with the value of property of that class and in that neighborhood. In my judgment, that property, before the Frisco road was built, was worth about $15,000. I think the building of that road has damaged it about $3,000, and after it was built and in August, 1887, I think $12,000 was a fair valuation of that property.

Witness was here shown a statement heretofore shown to plaintiff and addressed to Messrs. Hough, Essex, and O'Bear, and was asked if he recognized it, and, if so, what it was; in answer to which he testified: This paper was either read or delivered to us while
38 acting as commissioners by Mr. Mathews, the plaintiff; and defendant offered to prove by this witness:

1st. That in the report of commissioners they awarded to plaintiff the gross sum of nine thousand dollars as damages to all his property.

2nd. That of this sum three thousand dollars was allowed as special damage to the home place.

3rd. That in estimating this damage they took into consideration

the danger to said property from accidental fire set out by engines which should be used on said railroad.

4th. That the parties to said proceedings agreed to abide the finding of said commissioners and finally settle in accordance with the report.

To all of which plaintiff objected as irrelevant and immaterial; which objections were by the court sustained, and said testimony was excluded; to which ruling the defendant excepted at the time, and defendant introduced as a witness WM. T. ESSEX, who testified as follows:

I was in 1882 one of the commissioners appointed by the circuit court of St. Louis county to assess the damages in condemnation proceedings of St. Louis and San Francisco Company against Leonard Mathews, caused by the running of the road of said company through his property.

Was then, am now, and have been for many years well acquainted with that part of plaintiff's property known as the Home place; am and have been for a long time well acquainted with the value of property of that class and in that neighborhood. In my
39 judgment, the *the* property, before the Frisco road was built, was worth about $15,00-. I think the building of that road has damaged it about $3,000, and after it was built and in August, 1887, I think $12,000 was a fair valuation of that property. Witness was here shown the statement heretofore shown plaintiff and addressed to Messrs. Hough, Essex, and O'Bear, and was asked if he recognized it, and, if so, what it was; in answer to which he testified: This paper was either read or delivered to us while acting as commissioners by Mr. Mathews, the plaintiff; and defendant offered to prove by this witness:

1st. That in the report of the commissioners they awarded to plaintiff the gross sum of nine thousand dollars as damages to all his property.

2nd. That of the sum three thousand dollars was allowed to special damages to the home place.

3rd. That in estimating this damage they took into consideration the danger to said property from accidental fires set out by engines which would be used on said railroad.

4th. That the parties to said proceedings agreed to abide the finding of said commissioners, and finally settled in accordance with that report.

To all of which plaintiff objected as irrelevant and immaterial; which objections were by the court sustained, and said testimony was excluded; to which ruling the defendant excepted at the time, and defendant offered in evidence and read to the jury the statement identified and testified to by plaintiff, Hough, and Essex as having been delivered or read to the commissioners in the condemnation proceedings, which is as follows:

40 Messrs. Henry W. Hough, Wm. T. Essex, and Ephraim G. O'Bear, commissioners.

GENTLEMEN: The St. Louis and San Francisco Railway Company and myself have agreed to refer to you the amount of damage I will sustain by running its road with a Y connecting with the Carondolet branch through my property at Oakland station. In proceedings at law I am entitled to all possible damage, direct or indirect, present or remote, under all circumstances or contingencies that may arise or probably will accrue, and no benefit, should any be possible, can be credited to the account, and if any doubts arise in your minds I should have the benefit thereof.

I claim the following for which I should be compensated:

1st. The actual amount of ground taken.

2nd. By running the road through my property with the connecting "Y" it will so injure the property as a place of residence as to render all my improvements practically worthless, and they cost me over thirty thousand dollars.

3rd. The land will be so cut up as to render a very large portion of it practically worthless, and that which is left will be greatly deteriorated in value.

The land cost me in 1866 and 1868 forty-two thousand dollars, and this was a time when property was greatly depressed, and it has been worth more than double since and would soon be very much more valuable than it is now were it not for the railroad cutting it up as it will, as this will prevent me from realizing any benefit from the coming boom.

I will enumerate some of the damages that will be caused by the road as proposed, viz:

41 Damage by fire for all time to come.

Damage of teams running away.

Damage of crossing various tracks.

There will be a 27½-foot cut south of my dwelling-house which will prevent any one from driving across the tracks from seeing or hearing the trains until quite on the tracks. This renders the property unfit for residence and unsalable, because any one desiring a fine residence would not live where such dangers surround it. The deep cuts on both the main road and branches as well as the heavy fills divide the property so that it cannot be used for passage or residence lots. Annoyance from smoke and noise. Loss of a large number of fruit trees and dividing my orchards so that those trees not destroyed will be useless by their isolation and exposure to thieves. Loss of several hundred feet of fine hedge which cannot be replaced for years and without great cost. Loss of about one thousand fine evergreens. Cutting off the water supply from my pond, thus necessitating draining it, because it will become stagnant, and this would render it necessary to tear down my boat-house and ice-house and leveling the dam.

Dissecting the property into a number of ugly shaped pieces.

Ugly angles where the road and branches run through the property.

Great damage during construction by marauding laborers making my orchard useless and preventing my occupying, renting, or selling the place for a long time.

Great number of tracks to be crossed. Will run within one hundred feet of my house on west side of Holmes avenue,
42 thus practically destroying its value.

The only dedicated streets through the property are Holmes and Schultze avenues.

From the above I claim my — is injured seventy-five per cent. of its value, and ask you to value it and allow me accordingly.

Respectfully, LEONARD MATHEWS.

And defendant offered and read in evidence the following petition:

CITY OF ST. LOUIS, *ss*:

LEONARD MATHEWS *vs.* THE MISSOURI PACIFIC RAILWAY COMPANY. } In the Circuit Court of the City of St. Louis.

FEBRUARY TERM, 1882.

Plaintiff states that during the month of August, 1881, Edward Whitaker, as trustee of Mary N. Mathews, wife of plaintiff, was the owner and in possession of a certain tract of land containing 11.173 acres, with valuable improvements thereon, situated near Oakland Station, St. Louis county, Missouri, and lately the residence of plaintiff; that defendant, a corporation under the laws of Missouri, was the owner and engaged in operating a line of railway adjoining said land on the north side; that defendant negligently suffered a large amount of dry grass and rubbish to accumulate and remain upon its said railway and right of way adjoining said land and used and employed in operating said railway engines and other machinery that were improperly and negligently constructed, and that on the 2nd day of August, 1881, by reason of defendant's said negligence, fire was communicated to said
43 dry grass and rubbish on said right of way and extended to said land and destroyed shrubbery, vegetation, trees, and improvements thereon of great value, to wit, $3,000, and injured said land to the damage of said Edward Whitaker, as such trustee of said Mary N. Mathews, in the sum of $3,000.

Afterwards, on the 1st day of November, 1881, said Edward Whitaker, as trustee, and said Mary N. Mathews, for value, assigned all his and their damages and right of action for the matter aforesaid to one Edward R. Rawlings, who afterwards, on the same day, for value received, assigned the same to plaintiff.

Wherefore plaintiff prays judgment for the damages aforesaid, with costs.

And for a second cause of action plaintiff says that during the month of August, 1881, Edward Whitaker, as trustee for the said Mary N. Mathews, was the owner and in possession of the said tract

of land in the first count described and the said defendant was the owner of and operating the said railway adjoining said land on the north side.

That defendant negligently suffered a large amount of dry grass and rubbish to accummulate on its said railway right of was adjoining said land, and negligently operated its railway by means of engines and other machinery that were improperly and negligently constructed, and that by means of defendant's said negligence the premises, to wit, of the 9th day of August, 1881, fire was communicated to said dry grass and rubbish on defendant's said right of way and extended thence to said land adjoining, and thereby a large number of ties, shrubbery, and vegetation growing on said
44 land was destroyed of great value, to wit, $3,000, and said land was injured in said amount and to the damage of said Edward Whitaker and of said Mary N. Mathews in the sum of $3,000.

Afterwards, on the 1st day of November, 1881, said Edward Whitaker, as such trustee, and said Mary N. Mathews, for value, assigned all his and their damages and right of action for the matter aforesaid to one Edward R. Rawlings, who afterwards, on the same day, for value, assigned the same to plaintiff.

Wherefore plaintiff prays judgment for the damages last aforesaid, with costs.

JOHN G. CHANDLER,
Attorney for Pl'ff.

And defendant offered in evidence the following petition:

STATE OF MISSOURI, } *ss:*
County of St. Louis, }

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Plaintiff,
vs.
LEONARD MATHEWS, EDWARD WHITAKER, Trustee; Mary N. Mathews and Leonard Mathews, Her Husband; John G.
45 Chandler, Charles Hodgman, George F. Drake, Trustee; Emile O'Brien, Wm. O'Brien, Her Husband; Semple and Birge Mfg. Company; David F. Kane, Trustee; Barbara Pudewite; Albert Pudewite, Her Husband; Peter Huthmaker, John H. Deikman, Trustee; Catherine Jorgenson, Gustavus Fisher, and Emile Ulrici, Defendants.

In the Circuit Court, County of St. Louis.

The petition of the St. Louis and San Francisco Railway Company respectfully states and shows to this honorable court that it is a corporation created and organized under the provisions of chapter 37, Wagner's Statute of the State of Missouri, for the pur-

pose of purchasing "the Atlantic and Pacific railroad" and franchises pertaining thereto, and construction, operating, and maintaining the same under said franchises, and for the purpose — constructing, maintaining, and operating a standard-guage railway from a point on the eastern terminus on said *on said* A. & P. railroad in the county of Franklin, running thence in a general northeasterly direction through the counties of Franklin and St. Louis and the city of St. Louis to the Union depot in said city of St. Louis, State of Missouri.

That your petitioner, as authorized by its charter and the laws of the said State of Missouri, is about to construct, operate, and maintain a standard-guage railway from a point on the eastern terminus of the said A. & P. railroad in said town of Pacific, in said county of Franklin, in the State of Missouri, running thence east-
46 erly and northeasterly through the said counties of Franklin and St. Louis, and thence through said city of St. Louis to the Union depot, 7th street, in said city of St. Louis.

That your petitioner has made a profile map of the route adopted by your petitioner in the said county of St. Louis; that said profile map has been certified to by the president and chief engineer of said San Francisco Railway Company and has been duly filed in the office of the county clerk of the said county of St. Louis; that said profile map, made and certified as aforesaid and filed in the office of the county clerk in the said county of St. Louis, show- the actual survey, location, and distance of the road-bed through the several lots and tracts of land and the congressional sections through which said road runs and the location and number of miles of main and side tracks of said railroad in said county of St. Louis.

That your petitioner has given written notice to the several defendants, owners, and occupants of the several tracts of land hereinafter described of the location of said road through the same respectively as shown by its profile map.

Your petitioner further states and represents to this honorable court that it needs and seeks to acquire for the purposes aforesaid and for the additional purposes of cuttings and embankments necessary for the proper construction and security of said railroad the following tracts or parcels of land situated in said county of St. Louis, in said State of Missouri, described as follows:

First parcel. A strip of land extending in a course southwestwardly 100 feet in width, situate in East Kirkwood, in St. Louis county, State of Missouri, and being a part of lots 69, 70, 71,
47 72, and 74 of said subdivision known as East Kirkwood, and the center line of which strip of land is more particularly described as follows, to wit:

Beginning at station No. 618 plus 55 feet, in the survey of the St. Louis and San Francisco railway as recently surveyed and located, which station is on the dividing line between the lands of Leonard Mathews and Stone, in lots 74 of East Kirkwood, and running thence south 73½ degrees west along the center line of said railroad as surveyed and located 1,720 feet to the intersection with the southern line of said lot 69, being the center of Leffingwell ave-

nue, and which said strip of land contains 3.72 acres; that Leonard Mathews is the owner of said land; that your petitioner desires to construct its railroad in the direction aforesaid over and upon said land.

2nd parcel. A tract of land situate in the southwest quarter of section 6, township 44 north of range 6 east of the 5th principal meridian, in the county of St. Louis, State of Missouri, and more particularly described as follows:

Commencing at the southwest corner of a tract of land owned by Rob't Anderson, which corner is the center line of Elliott avenue, about 1,184 feet east of the center line of Holmes avenue, and running thence from the point of beginning north 27 and $\frac{3}{6}$ degrees west along a plank fence on Robert Anderson's western line about 104 feet to a point 50 feet northwardly from and at right angles with the center line of the St. Louis and San Francisco railway as recently surveyed — staked out and running thence south 73¼ degrees west parallel to the center line of the aforesaid railroad about 292 feet to the intersection with the southern line of the aforesaid section 6 (being the center line of Elliott avenue) and running thence eastwardly along the southern line of said section 6 to the place of beginning, containing $\frac{1}{3}$ of an acre; that the title to
48 said premises is vested in Ed. Whitaker, trustee, in trust for Mary N. Mathews, wife of Leonard Mathews, for and during her natural life, with power in her to order and direct the disposal thereof by deed or will or other instrument under hand; that Ed. Whitaker, trustee aforesaid, and Mary N. Mathews are joined in this suit with Leonard Mathews, husband of said Mary N. Mathews.

That your petitioner desires to construct its railroad in the direction aforesaid (from northeast to southwest) over and upon said land.

3rd tract. A triangular tract of land lying in and being a part of a lot in the town of East Kirkwood having a front of 230 feet on the eastern line of Holmes avenue by a depth eastwardly between parallel lines of 300 feet, being part of lot 74 and lot 75 of said town, and which triangular tract is more particularly described as follows:

Beginning at the northwest corner of said lot 270 feet south of said south line of Elliott avenue, thence south along the east line of Holmes avenue 87 feet, more or less, to a point fifty feet perpendicularly to the center line of the St. Louis and San Francisco railroad as recently surveyed and staked out; thence north 73 degrees fifteen minutes east and parallel to said center line 280 feet to the north boundary of said lot, thence west along said northern boundary 265 feet, more or less, to the place of beginning, containing 32 acres; that the name of the owner of said land is John G. Chandler; that Leonard Mathews holds a deed of trust on said land in which Ed. Whitaker is his trustee, and that by reason of said deed of trust said Whitaker, as trustee aforesaid, and said Mathews claim to have an interest in said land.

That Charles Hodgman holds a deed of trust on said land in which George S. Drake is his trustee, and that said Drake, trustee

as aforesaid, and said Hodgman claim an interest in said land by reason and virtue of said deed of trust; that your petitioner
49 desires to construct its road over and upon said lands in a direction extending from northeasterly to southwesterly.

4th parcel. A triangular strip of land lying and being a part of lots 66 and 67 of East Kirkwood, Missouri, containing together 9.81 acres to the center of the street; which said strip is more particularly described as follows, to wit:

Beginning at a point in the center line of Short avenue 50 feet perpendicularly distant from the center line of the San Francisco railroad, as recently surveyed and staked out, thence south 73 degrees fifteen minutes west and parallel to said center line of said railway 260 feet to the center line of Elliot avenue; thence south 107 feet, more or less, to a point on the center line of Elliot avenue 50 feet perpendicularly distant from the center line of the San Francisco railroad, as recently surveyed and located; thence north 73 degrees and 15 minutes east and parallel to the center line of said railroad 68 feet to the center line of Short avenue; thence northeasterly along the center line of Short avenue 250 feet, more or less, to the place of beginning, containing .37 acres.

That Emily J. O'Brien, joined herein with her husband, Wm. R. O'Brien, is the owner of said land; that Semple and Birge Manufacturing Company holds a deed of trust on said land, wherein James S. Kane is trustee, and that by reason and virtue of said deed of trust said Kane, as trustee, and said Semple and Birge Manufacturing Company claim an interest in said land; that your petitioner desires to construct its railroad over and upon said land in a southwesterly direction.

50 5th parcel. A triangular strip of land situate and being a patr of a tract of land in the southeast quarter of section 11, township 44 north, range 5 east, containing ten acres, and which said strip is more particularly described as follows, to wit:

Beginning the northeast corner of the southeast quarter of section 11, town. 44 north, range 5 east, in the county of St. Louis, State of Missouri, thence west and along the east and west center line through section 11, town. 44, range 5 east, 330 feet; thence 190 feet to a point 50 feet perpendicularly distant to the center line of the San Francisco railway, as recently surveyed and staked out; thence north 73 degrees 15 minutes east and parallel with the line of said railway 352 feet to the eastern line of section 11, township 44 north, range 5 east; thence north 65 feet, more or less, from the place of beginning, and the name of the owner of said land is Barbara Pudiwite, with whom is joined in these proceedings Albert Pudiwite, her husband; that your petitioner desires to construct its road over and upon said triangular strip of land in a direction extending from northeasterly to southwesterly, and to use it for additional purpose of cuttings and embankments necessary for the proper construction and security of said road.

6th parcel. A strip of land 100 feet in width, extending from northeasterly to southwestwardly, situate in and being a part of the west half and southeast quarter of section 11, township 44 north, range 5

east, containing 80 acres, the center line of which said strip is more particularly described as follows, to wit:

Beginning at the intersection of the center line of the San Francisco railroad, as surveyed and staked out, with the eastern boundary of the west half of the southeast quarter of section 11, township 44 north, range 5 east, thence south 73 degrees 15 mins.
51 west along said center line 1,441 feet, more or less, to the north and south center line of section 11, township 44 north, range 5 east, and which said strip of land contains 3.31 acres.

That the name of the owner of said land is Peter Huthmaker; that there is a deed of trust on said land given to John H. Deickman, trustee for Catherine A. Jorgerson, and that said Deickman, as trustee, and said Cathreine Jorgenson claim an interest in said land by said deed of trust and are made parties hereto; that your petitioner desires to construct its railroad aforesaid over and upon said land.

7th parcel. A strip of land 170 feet in width and 1,360 feet in length situate in and being a part of the east half of the southeast quarter of sec. 10, town. 44 north, range 5 east, in St. Louis county, State of Missouri; which said strip is more particularly described as follows:

Commencing at the northeast corner of the southwest quarter of said section 10, thence west along the center line of said section 10 1,360 feet to a point in the Quinette road, thence south 170 feet, thence — 1,360 feet, thence north 170 feet to the place of beginning, said strip being the northern 170 feet of said east half of said southeast quarter of said section 10 and containing 5 and $\frac{31}{100}$ acres; that the names of the owners of said tracts of land are Gustavus Fisher and Emile Ulrici, tenants in common; that your petitioner desires to construct its road over and upon said strip in a curved line in a direction extending easterly to westerly and use said strip of land for the additional purposes of cuttings and embankments necessary for the proper construction of said railroad.

52 Your petitioner further states that all of the owners of the property and different — hereinbefore described are residents of the said circuit; that your petitioner herein and the said several owners of said several tracts of land can-ot nor can your petitioner and any one of such owners agree upon the proper compensation to be paid for said land or any interest therein which your petitioner seeks to acquire, although your petitioner -as attempted so to do.

Your petitioner therefore prays that this honorable court or the judge thereof in vacation appoint three disinterested freeholders, residents of said county of St. Louis, as commissioners to ascertain and assess the damages which said owners of said several tracts of land may severally sustain and the just compensation to which they may severally be entitled in consequence of the construction, maintenance, and operation of said railway and use of said several tracts of land therefor.

ST. LOUIS AND SAN FRANCISCO
RAILWAY COMPANY,
By JOHN O'DAY, *Attorney.*

To the introduction of which plaintiff objected because immaterial and irrelevant; which objection was by the court sustained and said testimony excluded; to which ruling the defendant excepted at the time.

And defendant offered in evidence the following deed:

Deed from L. Matthews and Wife to St. Louis & S. F. R. R. Co.

JULY 15, '82.

This indenture made on the fifteenth day of July, A. D. 1882, by and between Leonard Matthews and Mary N. Mathews his wife of the city of St. Louis and State of Missouri parties of the first part and the St. Louis & San Francisco Railway Company, a corpora-
53 tion duly created, organized, and existing under the general laws of the State of Missouri party of the second part.

Witnesseth: That the said parties of the first part, in consideration of the sum on nine thousand ($9,000) dollars to them paid by the said party of the second part, the receipt of which is hereby acknowledged do by these presents, grant bargain and sell convey and confirm unto the said party of the second part its successors and assigns the following-described lots, tracts or parcels of land, lying, being and situated in the county of St. Louis and State of Missouri, to wit:

First. A tract of land in the southwest quarter of section 6, township 44 north, range 6 east and being more particularly described as follows to wit:

Beginning at a point in the line dividing the property of said Leonard Matthews and the property of Robert Anderson, northwardly of and fifty feet perpendicularly distant from the center line of the St. Louis and San Francisco railway as recently surveyed and located, and running thence south 73 degrees and fifteen minutes west and parallel with said center line of said railway three hundred and eighty feet more or less to the northern boundary line of a tract of land recently acquired by said railway company from E. F. Stone.

Thence eastwardly along said last-named boundary line three hundred and fifteen feet more or less to a point in said last-named boundary line southwardly of and fifty (50) feet perpendicularly distant from said center line of said railway. Thence north seventy-three degrees and fifteen minutes east and parallel with said center line of said railway one hundred and seven feet more or less
54 to intersection with western boundary line of said property of said Robert Anderson. Thence north 27 degrees and fifteen minutes west one hundred and four feet more or less to the place of beginning and contains fifty-six hundredths of an acre more or less.

Second. A tract of land in lots, 72, 73 and 74 of the town of East Kirkwood and being more particularly described as follows, to wit:

Beginning at a point in the line dividing the property of said

railway company (recently acquired from E. F. Stone) and the property of said Leonard Matthews. Northwardly of and fifty feet perpendicularly distant from the center line of the St. Louis and San Francisco railway as recently surveyed and located and running thence south 73 degrees and 15 minutes west and parallel with said center line of said railway 724 feet more or less to intersection with the eastern boundary line of the right of way of the Carondolet branch of the Missouri Pacific railway thence southeastwardly along said last-named boundary line three hundred feet more or less to intersection with the center line of Holmes avenue.

Thence northwardly along said center line of said Holmes avenue 295 feet more or less to a point 41 feet northwardly from said center line of said St. Louis and San Francisco railway thence easterly along the northern line of the property recently acquired by said St. Louis and San Francisco Railroad Company (by condemnation) from John G. Chandler 300 feet more or less to a point southwardly of and 50 feet perpendicularly distant from said center line of said
55 St. Louis and San Francisco railroad; thence north 73 degrees and 15 minutes east and parallel with said center line of said last-named railway 190 feet more or less to the intersection with the property of said St. Louis and San Francisco Company (recently acquired of said E. F. Stone) thence northwardly along said last-named boundary line 104 feet more or less to the place of beginning and containing one and $\frac{38}{100}$ths acres more or less.

Third. A tract of land in lots 69, 70, 71, 72, and 73 of the town of East Kirkwood and being more particularly described as follows, to wit:

Beginning at a point in the western boundary line of the right of way of the Carondelet branch of the Missouri Pacific railway northwardly of and fifty feet perpendicularly distant, from the center line of the St. Louis and San Francisco railway as recently surveyed and located, and running thence south 73 degrees and fifteen minutes west and parallel with said center line of said last-named railway 990 feet more or less to a point in the center line of Leffingwell avenue thence southeastwardly along said center line of said avenue 170 feet more or less to a point southwardly of and 50 feet perpendicularly distant from said center line of said railway company thence north 73 degrees and 15 minutes east, and parallel with said last-named center line 355 feet more or less to a point southwardly of and 50 feet perpendicularly distant from said center line of said last-named railway thence south 16 degrees and 45 minutes east a distance of 50 feet thence by a curve 616 feet radius 830 feet to a point in the center line of Holmes avenue, thence northwardly 145 feet more or less to intersection with the western boundary line of said right of way of said Carondelet branch of said Missouri
56 Pacific railway, thence northwestwardly along said last-named boundary line 520 feet more or less to place of beginning and containing $4\frac{77}{100}$th- acres more or less. Said tracts of land (three in number) are shown on the attached plat and colored red thereon.

To have and to hold the premises aforesaid with all and singular

the rights, privileges, appurtenances immunities and improvements thereto belonging or in any ways appertaining unto the said party of the second part and unto its successors and assigns forever the said Leonard Mathews and Mary N. Mathews his wife hereby covenanting that they will warrant and defend the title to the said premises unto the said party of the second part and unto its successors and assigns forever against the lawful claims and demands of all persons whomsoever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

LEONARD MATHEWS. [SEAL.]
MARY MATHEWS. [SEAL.]

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that on the 15th day of July, A. D. 1892, before the undersigned, notary public within and for the city of St. Louis and State of Missouri, personally came Leonard Mathews and Mary N. Mathews, his wife, who are personally known to me to be the same persons whose names are subscribed in the foregoing instrument of writing as parties thereto, and they acknowledge- the same to be their act and deed for the purpose herein mentioned; and the said Mary N. Mathews, being by me first made acquainted with the contents of said instrument upon an examination separate
57 and apart from her husband, acknowledged that she executed the same and relinquishes her dower in the real estate therein mentioned freely and without fear, compulsion, and undue influence on the part of her said husband; and I certify that my term of office as a notary public will expire June 27th, 1885.

I- testimony whereof I have hereunto set my hand and affixed my official seal, at my office, in the city of St. Louis, this day and year first above written.

[SEAL.] CHAPMAN S. CHARLOT,
Notary Public.

STATE OF MISSOURI, } ss:
County of St. Louis, }

I, the undersigned, recorder of deeds of said county, hereby certify that the foregoing instrument of writing and plat *was* filed for record in my office on July 19th, 1882, at ten o'clock and 31 minutes a. m., and *was* truly recorded in Book 18, page 222.

Witness my hand and official seal this 19th day of July, A. D. 1882.

F. REUHL, *Recorder,* [SEAL.]
Per D. SCHMIDT, *D. P.*

To the introduction of which the plaintiff objected as irrelevant and immaterial; which objections were by the court sustained and said evidence excluded; to which ruling defendant excepted at the time.

Articles of Incorporation of Defendant.

Articles of association made and entered into this seventh day of September, A. D. one thousand eight hundred and seventy-six.

SECTION 1ST. The following persons do hereby associate themselves together for the purpose of purchasing the Atlantic
58 and Pacific railroad and franchises pertaining thereto, constructing, maintaining, and operating the same under said franchises for public use in the conveyance of persons and property and to transfer persons and freight on land by railway:

Andrew Pierce,	whose residence is in the city and State of New York.	
Joseph Seligman,	"	" "
James D. Fish,	"	" "
John P. Robinson,	"	" "
W. H. Coffin,	"	" "
James Baker,	"	" St. Louis, Mo.
Samuel Hays,	"	" "
George F. Stone,	whose residence is in Morristown, New Jersey.	
C. B. Fisk,	"	city and State of New York.
Thomas W. Price,	"	" Boston, Mass.
William F. Buckley,	"	city and State of New York.
C. W. Rodgers,	"	" St. Louis, Missouri.
Henry F. Verhwen,	"	city and State of New York.

SECTION 2ND. This association shall be called the "St. Louis and San Francisco Railway Company" and shall continue in existence fifty years.

SECTION 3RD. The capital stock of said company shall be twenty-five million dollars (25,000,000) and shall consist of two hundred and fifty thousand shares (250,000), to be of the par value of one hundred dollars (100) each, which shall consist of four million five hundred thousand dollars (4,500,000) of first-preferred stock, ten million dollars (10,000,000) or preferred stock, ten million five hundred thousand dollars (10,500,000) of common stock.

59 SECTION 4TH. The length of said railway which is made is about two hundred and ninety-three miles (293) in the counties of St. Louis, Franklin, Crawford, Phelps, Pulaski, Camden, Laclede, Dallas, Webster, Greene, Christian, Lawrence, Stone, Barry, and Newton, in the State of Missouri, and constitutes a part of the main line of the railroad lately run and operated by a railroad company called the "Atlantic and Pacific Railroad Company," beginning at the town of Franklin or Pacific City, in said Franklin county, and running through said counties to the western line of the State or Missouri at or near the town of Seneca, in said Newton county, and the length of said railroad which is intended to be made is about thirty-seven (37) miles in the counties of Franklin and St. Louis between some points on the — line of said completed railroad at or near the eastern terminus thereof in said Franklin county and the Union depot in said city of St. Louis.

SECTION 5TH. The following-named persons, thirteen (13) in number, to wit:

Andrew Pierce, whose residence is in city and State of New York;
Joseph Seligman, " " " " "
James D. Fish, " " " " "
J. P. Robinson, " " " " "
W. H. Coffin, " " " " "
James Baker, whose residence is in St. Louis, Missouri;
Samuel Hays, " " " "
George F. Stone, " " Morristown, New Jersey;
C. B. Fisk, " " city and State of New York;
Thomas W. Peirce, whose residence is in Boston, Mass;
60 Wm. F. Buckley, whose residence is in city and State of New York;
C. W. Rogers, " " St. Louis, Missouri;
Henry F. Verhwen, " " city and State of New York,

shall compose the first board of directors for the management of the affairs of this association, and they shall continue to be directors and manage the affairs of said association for the first year and until others are chosen in their places.

SECTION 6TH. The stockholders of this association shall elect a board of directors in every year on the first Tuesday in March, which election shall take place at the office of the company in such manner as may be prescribed in the by-laws of this association.

SECTION 7TH. This association is organized under chapter thirty-seven (37) of Wagner's Statutes of Missouri, entitled "Of corporations, private."

We, the undersigned, subscribers to the capital stock of St. Louis and San Francisco Railway Company, hereby agree to take the number of shares of the capital stock of said company set opposite our names respectively and to pay the same at such times and in *in* such installments and in such manner as the directors of said company may require, and we do further hereby agree respectively to be governed by the above and foregoing articles of association.

ANDREW PRICE.....Five hundred shares.
JOSEPH SELIGMAN.....Five hundred shares.
JAMES B. FISH.....Two hundred shares.
J. P. ROBINSON.....Three hundred shares.
W. H. COFFIN.....Three hundred shares.
61 JAMES BAKER.....Two hundred shares.
SAMUEL HAYS.....One hundred shares.
GEORGE F. STONE.....Three hundred shares.
CLINTON B. FISK.....Three hundred shares.
WM. F. BUCKLEY.....Two hundred shares.
T. W. PEIRCE.....Four hundred shares.
C. W. ROGERS.....One hundred shares.
HENRY F. VERHWEN.....One hundred shares.

STATE OF MISSOURI, } ss:
County of St. Louis, }

W. H. Coffin, James Baker, and C. W. Rogers, three of the directors of the St. Louis and San Francisco Railway Company named in the above and foregoing articles of association, being first duly sworn by law, come and on their respective oaths state that the above and foregoing articles of association herewith filed contain the true and original list of subscribers to the capital stock of said railway company, and that one thousand dollars (1,000) of stock for every mile of railroad now made and proposed to be made by said company is *in* subscribed thereto and five per cent. paid thereon in good faith and in cash to the directors named in said articles of association.

Affiants further state that more than thirty-five hundred shares (3,500) of the stock of said company have been paid, in good faith subscribed, and five per cent. paid in cash thereon as aforesaid, and that it is intended in good faith to construct, maintain, and operate the road mentioned in said articles of association.

W. H. COFFIN.
JAMES BAKER.
C. W. ROGERS.

62 Sworn to and subscribed before the undersigned, notary public, on this 7th day of September, A. D. 1876.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office, in the city of St. Louis, in the State of Missouri, on the day and year last aforesaid; and I certify that I qualified as notary public September 29th, 1873, and that my term expires September 21st, 1877.

[SEAL.] A. S. DEANE,
Notary Public.

Endorsed: Filed September 10th, 1876, at 9 o'clock a. m. Michael K. McGrath, secretary of state.

And upon inquiry by the court as to the purpose for which this testimony was offered defendant's counsel stated that the purpose was to show that its articles of incorporation were antecedent in date to the passage of the act of March 30th, 1887, and that it was organized in September, 1876.

And said articles were admitted in evidence by the court for that purpose and read without objection.

This was all the evidence offered by defendant, and in rebuttal plaintiff offered evidence tending to show that the witness Mediary from where he testified he was when he saw Dorsey burning brush on August 29, 1887, could not see whether any one was burning brush on plaintiff's place, and proved by plaintiff that the case of Mathews against The Missouri Pacific Railway Company was settled by a compromise of $600, and that sum was all he ever received on account of that suit.

This being all the evidence, the defendant renewed its mo-
63 tion to compel plaintiff to elect between the counts in his petition, and the court sustained said motion; to which ruling the plaintiff at the time objected and excepted, and the plaintiff being so required under protest elected to stand on the second count of his petition.

The court thereupon gave the following instruction on behalf of the plaintiff, to which defendant objected and excepted at the time:

Plaintiff's Instruction Given.

The court instructs the jury that if they believe from the evidence that during the month of August, 1887, plaintiff was the owner of the land in the petition described and defendant was the owner or operating a railroad adjoining said land, having locomotive engines in use upon said road, and that on the 9th day of August, 1887, fire was communicated from a locomotive engine then in use upon the railroad owned or operated by defendant to plaintiff's property on his said land, and thereby the buildings and other property in the petition mentioned or any of it were destroyed, then the jury will find for the plaintiff.

The court gave the following instruction of its own motion, to which defendant objected and excepted at the time:

Instruction Given of Court's Own Motion.

The court instructs the jury that if they find for the plaintiff they will proceed to assess his damages at the reasonable value, at the time and place of the fire, of all such property of plaintiff mentioned in the petition as they shall from the evidence find to have been destroyed; in order to ascertain the value of the prop-
64 erty destroyed by the fire you should take the value of the property as you may find the same from the evidence to have been immediately before the fire and the value thereof immediately after the fire and take the difference between the two valuations as the measure of damages.

The word value as used in these instructions means what it was reasonably worth in the market.

And at the request of the defendant the court gave the following instructions:

Defendant's Instructions Refused.

The jury is instructed that it devolves upon the plaintiff to prove by a preponderance of evidence that the fire named in plaintiff's petition was communicated from a locomotive engine in use on defendant's road before he is entitled to recover.

The jury is instructed that the testimony of witnesses as to cost of individual buildings and of individual pieces of property will not be considered by them as furnishing a measure of damages, but will be considered by them only so far as it tends to show what the property was worth at the time of the fire, and should they find for

plaintiff they will not base their assessment of damages upon any fancy or speculative valuation of the property destroyed or any part thereof.

And defendant prayed the court to give the following instructions, to wit:

Defendant's Instructions Refused.

1st. If the jury believe from the evidence that upon the location of defendant's road through the premises described in plaintiff's petition the plaintiff and defendant could not agree upon
65 the compensation to which plaintiff was entitled for damages for running its road through the same, and that proceedings were instituted by the defendant to condemn a right of way through said premises, and the commissioners were duly appointed to assess said damages; that said commissioners did assess said damages, and that said cause and proceedings *was* compromised by defendant paying to plaintiff and plaintiff receiving from defendant the amount of such assessment, then plaintiff cannot recover, provided such proceedings and compromise were had prior to March 31st, 1887.

2nd. If the jury believe from the evidence that upon the location of defendant's road through premises described in plaintiff's petition that plaintiff was entitled for damages for running its road through the same, and that proceedings were instituted by the defendant to condemn a right of way through said premises, and that commissioners were duly appointed to assess the said damages, and that commissioners did assess said damages, and that said cause and proceedings were compromised by defendant paying to plaintiff and plaintiff receiving from defendant the amount of such assessment (and that in such assessment the danger to plaintiff's property by accidental fire was taken into consideration by said commissioners and by plaintiff and defendant), then plaintiff cannot recover, provided such proceedings and compromise *was* had prior to March 31st, 1887.

3.

The jury is instructed that the liability of defendant upon the cause of action set forth in the second count of plaintiff's petition is coextensive with its right to insure the property destroyed,
66 and the defendant is not liable on said second count for the destruction of any property which from its inherent nature was uninsurable.

4.

Though the jury may believe from the evidence that fire was communicated from a locomotive engine in use on defendant's railroad to plaintiff's property, as charged in the second count of plaintiff's petition, yet that fact is only *prima facie* evidence of negligence on the part of defendant, and unless the jury believe from the whole evidence in the case that said fire was either negligently set out by defendant or was communicated to plaintiff's property by reason of defendant's negligence the plaintiff cannot recover.

5.

Though the jury may believe from the evidence that fire was communicated from a locomotive engine in use on defendant's railway to plaintiff's property adjacent to defendant's right of way, as was charged in the second count of plaintiff's petition, yet the plaintiff is not entitled to recover anything on account of any personal property which may have been thereby destroyed.

6.

Though the jury may believe from the evidence that the fire was communicated from a locomotive engine in use on defendant's railway to plaintiff's property adjacent to defendant's right of way, as charged in the second count of plaintiff's petition, yet the plaintiff is not entitled to recover anything on account of any trees and shrubbery which may have been thereby destroyed.

7.

67 Though the jury may believe from the evidence that fire was communicated from a locomotive engine in use on defendant's railway to plaintiff's property adjacent to defendant's right of way, as charged in the second count of plaintiff's petition, yet if they further believe from the evidence that at the time of the fire named in plaintiff's petition there *was* growing upon the property in plaintiff's petition described, adjacent to said right of way of defendant, dry grass, dry weeds, dry leaves, and other combustible and inflammable material, and that such grass, weeds, and other material had been negligently permitted to accumulate at said time and place to an unusual and unreasonable extent, and that such unusual and unreasonable accumulation did proximately or directly contribute to the injury complained of by plaintiff, then plaintiff cannot recover for such injury.

8.

Though the jury may believe that defendant is liable for the inception of the fire, as that liability is defined in the other instructions, yet if they further believe from the evidence that at the time of the fire named in the plaintiff's petition there *was* growing upon the property in plaintiff's petition described, adjacent to said right of way of defendant, dry grass, dry leaves, dry weeds, and other combustible and inflammible material, and that such grass, weeds, and other material had been negligently permitted to accumulate at said time and place to an unusual and unreasonable extent, and that such unusual and unreasonable accumulation did proximately or directly augment the injury complained of by plaintiff, then plaintiff can recover for only so much of said injury as would have followed had he himself not been negligent in that regard.

68 9.

The jury are instructed that under the pleading and the evidence the plaintiff is not entitled to recover on the second count of his petition.

10.

The jury are instructed that in case you find for the plaintiff, in that case the measure of his damages is the difference between the value of the premises immediately before and immediately after the fire.

That the word value, as used in the above instruction, means what the property in question was worth in the market, and should they find for the plaintiff they will not base their assessment of damages upon any fancy or speculative valuation of the property destroyed or any part thereof.

All of which were by the court refused; to which ruling the defendant excepted at the time.

And the jury on the 14th judicial day of said term returned a verdict in favor of plaintiff for $11,000 on the second count of his petition, and within four days, to wit, on the 16th judicial day of said term, defendant filed its motion for a new trial; which said motion is as follows:

Motion for New Trial.

STATE OF MISSOURI, } ss:
City of St. Louis, }

In the Circuit Court, October Term, 189–.

LEONARD MATHEWS
vs.
69 ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY.

Motion for new trial.

Now, at this day, comes said defendant and moves the court to set aside the verdict heretofore rendered herein and grant it a new trial, and as reasons and grounds in support thereof assigns the following, viz:

1. Because said verdict is against the law and the evidence.
2. Because the court erred in not requiring plaintiff to elect before he went to trial.
3. Because the court erred in admitting any evidence under the petition over the objection of the defendant.
4. Because the court erred in admitting illegal, incompetent, and irrelevant evidence for the plaintiff over defendant's objection.
5. Because the court erred in excluding legal, competent, and relevant evidence offered by defendant.
6. Because the court erred in refusing the instructions asked by defendant in the nature of a demurrer to the evidence.
7. Because the court erred in refusing correct instructions asked by defendant.
8. Because the court erred in giving erroneous instructions on the part of plaintiff.
9. Because the court erred in not allowing the defendant to prove

that plaintiff had received the sum of $10,000 in insurance upon the property described in his petition.

10. Because the court erred in not allowing the defendant
70 to prove that plaintiff had been compensated for all loss by accidental fire at the time defendant acquired the right of way through the land of plaintiff.

11. Because the court erred in holding that the law of March 31st, 1887, was a valid enactment.

12. Because the act of March 31st, 1887, denied to the defendant the equal protection of the law, contrary to the provisions of section 1, article 14, of the amendment- to the Constitution of the United States.

Deprived defendant of its property without due process of law, contrary to the provisions of article 5 of the amendments to the Constitution of the United States, and impaired the obligations of a contract made between the State of Missouri and defendant, contrary to the provisions of article 1, section 10, of the Constitution of the United States.

13. Because the act of March 31st, 1887, was contrary to the provisions of section 53, article 4, of the constitution of Missouri.

14. Because the court erred in refusing the instruction asked by defendant based upon the contributory negligence of plaintiff.

15. Because the defendant was denied the equal protection of the laws in this, that, unlike the other persons, it was not permitted to avail itself of plaintiff's contributory negligence as a defence herein.

16. Because on the whole record the verdict was for the wrong party.

KENNA, PARKER & SHERWOOD,
Attorneys for Defendant.

71 And said cause was by order of the court continued until the December term with said motion pending.

And on the 5th day of November, A. D. 1890, which was the 16th judicial day of said October, 1890, term, defendant filed its motion in arrest of judgment; which said motion is as follows:

Motion in Arrest.

STATE OF MISSOURI, } ss:
City of St. Louis, }

In the Circuit Court of said City, October Term, 1890.

LEONARD MATHEWS, Plaintiff,
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Defendant.

Motion in arrest.

Now comes the defendant and moves the court to arrest the judgment herein, and in support thereof assigns the following reasons, viz:

1. Because the record will not support the judgment.
2. Because plaintiff's petition fails to state facts sufficient to constitute a cause of action.
3. Because plaintiff's petition, being the count on which recovery was had, states no cause of action.
4. Because the court erred in holding that the act of the legislature of Missouri entitled "An act to establish the responsibility of railroad corporations, companies, and persons owning or
72 operating railroads for damages by fire communicated by locomotive engines," approved March 31st, 1887, was not in violation of section 30, article 2nd, of the constitution of the State of Missouri.
5. Because the court erred in holding that said act last named was not in violation of section 1, article 14th, of the amendments to the Constitution of the United States.
6. Because the court erred in holding that said act last above named was not in violation of article 5 to the amendments of the Constitution of the United States.
7. And because the court erred in holding that said act was not in violation of article 1 of section 10 of the Constitution of the United States.

KENNA, PARKER AND SHERWOOD,
Attorneys for Def't.

And on the 29th day of November, 1890, being the 35th judicial day of said October term, A. D. 1890, of said court, the following stipulation was entered into by counsel and filed in said cause, viz:

Stipulation.

STATE OF MISSOURI, } ss:
City of St. Louis, }

In the Circuit Court.

LEONARD MATHEWS, Plaintiff,
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Defendant.

73 Stipulation.

It is stipulated and agreed by and between the parties in the above-entitled action that the defendant shall have until the last day of the December term, 1890, to file its bill of exceptions.

JOHN G. CHANDLER,
Attorney for Plaintiff.
PARKER, SHERWOOD AND KENNA,
Attorneys for Def't.

And in addition thereto an order was by the consent of the parties entered herein by said court on the same day and on the same judicial day continuing this cause to the next term of said court, to wit, the December term.

Thereafter, on December 15th, 1890, the same being the 12th judicial day of the next term, to wit, the December term, 1890, of said court, said motion for new trial was overruled and defendant at the time excepted; and thereafter, to wit, on the date last aforesaid and the judicial day last aforesaid, the court overruled the motion in arrest of judgment; to which ruling defendant at the time excepted.

And defendant now here in open court tenders this bill of exceptions and asks that the same be signed and made a part of the record in this court, which is done this 30th day of January, A. D. 1891.

L. B. VALLIANT, [SEAL.]
Judge of the Circuit Court.

74 *Affidavit for Appeal.*

In the Circuit Court of the City of St. Louis, State of Missouri.

LEONARD MATHEWS
vs.
THE ST. LOUIS AND SAN FRANCISCO RAILWAY CO., Defendant.

Affidavit of L. F. Parker, attorney for appellant.

L. F. Parker, attorney for defendant, states that the appeal of the said defendant in the above-entitled cause is not made for vexation or delay, but because this affiant believes that the said appellant is aggrieved by the judgment and decision of the above-named court in said cause.

L. F. PARKER.

Subscribed and sworn to before me this 30th day of January, 1891.

PHILIP H. ZEPP, *Clerk.*

Appeal Bond.

In the Circuit Court of the City of St. Louis, State of Missouri.

LEONARD MATHEWS, Plaintiff, Respondent,
vs.
THE ST. LOUIS AND SAN FRANCISCO RAILWAY CO., Defendant, Appellant.

Know all men by these presents that we, The St. Louis and San Francisco Railway Company, as principal, and —— ——, as securities, are held and firmly bound unto Leonard Mathews in
75 the sum of twenty-five thousand dollars; for the payment of which we hereby bind ourselves and our heirs, executors, and administrators.

Upon the following conditions, however: That whereas said Leonard Mathews has in the circuit court of the city and State

aforesaid, in a certain cause therein pending, entitled Leonard Mathews, plaintiff, against The St. Louis and San Francisco Railway Co., def't, recovered a judgment against the said St. Louis and San Francisco Railway Company; and whereas the above-named appellant has, according to law, been granted an appeal to the supreme court of the State of Missouri in said cause:

Now, therefore, if the said St. Louis and San Francisco Railway Company shall prosecute its appeal with due diligence to a decision in said supreme court and shall perform such judgment as shall be given by the said supreme court in the premises and such a judgment as the said supreme court shall direct the circuit court aforesaid to give, and in case the judgment first aforesaid of the last-named court or any part thereof shall by said supreme court be affirmed, if, then, the said appellant shall comply with and perform the same so far as it may be affirmed and shall pay all the damages and costs which may be awarded against the said appellant by the said supreme court, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

In testimony whereof we have hereunto set our hands and seals this — day of ——, 188–.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY CO., [SEAL.]
By E. D. KENNA, *Gen'l Att'y.* [SEAL.]
H. S. MORRILL. [SEAL.]
E. C. SIMMONS. [SEAL.]
M. M. BUCK. [SEAL.]

76 Approved in open court this 30th day of January, 1891.

PHILIP H. ZEPP, *Clerk.*

Clerk's Certificate.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Philip H. Zepp, clerk of the circuit court, city of St. Louis, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remains on file and of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 12th day of March, 1891.

PHILIP H. ZEPP, *Clerk.* [SEAL.]

77 And afterwards, to wit, on the 20th day of October, 1892, in the supreme court of Missouri, division No. 2, the following further proceedings were had in said cause, viz:

LEONARD MATHEWS, Resp.,
vs.
ST. L. & SAN F. R'Y Co., App.

Come now the said parties, by attorneys, and upon their motion it is ordered by the court that this cause be continued to the January call of this docket.

And afterwards, to wit, on the 15th day of April, 1893, the following further proceedings were had in said cause, viz:

LEONARD MATHEWS, Resp.,
vs.
ST. L. & SAN F. R'Y Co., App.

Come now the said parties, by attorneys, and upon their stipulation herein filed it is ordered by the court that this cause be continued to May 2, 1893.

And afterwards, to wit, on the 3rd day of May, 1893, the following further proceedings were had in said cause, viz:

LEONARD MATHEWS, Resp.,
vs.
ST. L. & SAN F. R'Y Co., App.

Come now the said parties, by attorneys, and after argument herein submit this cause to the court.

And afterwards, to wit, on the 21st day of November, 1893, the following further proceedings were had in said cause, viz:

78 LEONARD MATHEWS, Respondent,
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Appellant.
} Appeal from Circuit Court, City of St. Louis.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid in form aforesaid by the said circuit court of the city of St. Louis rendered be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellant his costs and charges herein expended and have therefor execution.

(Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

79 In the Supreme Court of Missouri, April Term, 1893, Division No. 2.

LEONARD MATHEWS, Respondent,
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Appellant.

This is an action for damages caused by the destruction and injury to plaintiff's property, a suburban residence and grounds near the city of St. Louis, in St. Louis county, by fire alleged to have been set out by an engine operated by the defendant on its railroad. The petition contains two counts; the first being an action at common law, charging "that on the 9th day of August, 1887, and for a long time prior thereto, defendant negligently suffered a large amount of dry grass, weeds, and rubbish to accumulate and remain upon and along its railway and right of way adjoining the land of the plaintiff, and used and employed, in operating said railway, locomotive engines and other machinery that were improperly and negligently constructed, so that sparks of fire could and did needlessly escape said engine," and that by reason of such negligence fire was communicated to said dry grass, weeds, and rubbish, and extended to plaintiff's land, and destroyed a dwelling-house, barn, outbuildings, personal property therein, trees, and shrubbery, of the value of $30,000, for which judgment is prayed. The second count is based upon the statute (Rev. St. 1889, § 2615), and charges that the defendant owned and operated a railroad adjoining plaintiff's land, "having locomotive engines in use on the same, and on said 9th day of August, 1887, fire was communicated from a locomotive engine then in use upon said railroad, owned and operated by defendant as aforesaid, to plaintiff's property on his said land," and then avers the destruction of the same property, of the same value as charged in the first count, and avers damages in, and prays judgment for, the same amount.

The answer admits the incorporation of defendant, and the operation of the line of railway described in the petition, and the use of locomotive engines thereon, and denies generally every other allegation in the petition, and then, as special defenses to each count of the petition avers: "(1) That plaintiff has assigned to persons to this defendant unknown his right of action against this defendant, if any he ever had, and is neither a necessary nor proper party plaintiff herein, and is not the real party in interest, and is not, therefore, entitled to maintain or prosecute this action. (2) That there is a defect of plaintiff, in this, to wit, that the Detroit Fire & Marine Insurance Company, the Commercial Union Insurance Company, and the Imperial Fire Insurance Company, and each and every one of them, are parties in interest in this case, and are necessary parties plaintiff herein. (3) That, on the date and at the time in the petition mentioned, there were growing and standing upon the property in said petition described, adjacent to and continuous from the right of way of defendant to the house, shrubbery, and trees of plaintiff in his petition described, large quantities of dry grass, leaves, weeds, and other combustible and highly inflammable matter, which

were carelessly and negligently allowed to grow and accumulate upon said premises by and with the knowledge and consent of plaintiff; that the accumulation of dry, combustible, and highly inflammable matter as aforesaid had been carelessly and negligently allowed to remain upon said premises for a long time previous to the 9th day of August, 1887, to wit, for many years; that it was gross negligence for plaintiff to allow said dry and combustible matter to accumulate and remain upon his said premises without taking precautions to prevent the spread of fire which might accidentally be set upon the right of way of defendant railway company, or which might accidentally escape from passing engines, which said negligence of plaintiff did proximately and directly contribute to the injuries of which he complains. (4) That the said dwelling-house, barn, and outbuildings in the petition described were on the 9th day of August, 1887, insured in certain insurance companies named in the answer for the aggregate sum of $10,000, which, as defendant avers, was greatly in excess of the real value of said dwelling-house, barn, and outbuildings; that said insurance companies, after the fire in plaintiff's petition alleged, paid to said plaintiff the sum of $10,000 on account of the loss sustained by reason of the burning of said dwelling-house, barn, and outbuildings as aforesaid. Wherefore, defendant says that the sum so paid by the said insurance companies as aforesaid should be applied *pro tanto* to the satisfaction of plaintiff's claim, if any he has, which defendant denies."

And the answer, in addition to the above counts, which are common to both counts of the petition, contains the following counts, which are addressed to the second count of the petition only: "(5) Defendant avers that the alleged cause of action set forth in the second count of the petition is founded on an act of the legislature of the State of Missouri entitled 'An act to establish the responsibilities of railroad companies and persons owning or operating railroads for damages by fire communicated by locomotive engines,' approved March 31, 1887, which act defendant avers is illegal, unconstitutional, and void, in that it seeks to deprive the defendant of its property without due process of law, and is contrary to the provisions of section 30, art. 2, of the constitution of the State of Missouri. (6) That the said act of the legislature is illegal, unconstitutional, and void, in that it denies the defendant the equal protection of the law, contrary to the provisions of section 1, art. 14, of the amendments to the Constitution of the United States; and in this: that it deprives defendant of its property without due process of law, contrary to the provisions of article 5 of the amendments to the Constitution of the United States; and in this: that it impairs the obligations or a contract made between the State of Missouri and defendant, by the terms of which it was impliedly agreed that said defendant might and could use fire for the purpose of generating steam to propel locomotive engines, and cars attached thereto, and be responsible only for the negligent and careless use thereof; and is contrary to the provisions of article 1, § 10, of the Constitution of the United States. (7) That heretofore, to wit, on

the 1st day of June, A. D. 1882, the plaintiff was the owner of the land described in his petition, and also of a certain strip of land along and adjacent to the west side of said tract, 100 feet wide, being the same strip of land now occupied by defendant's road-bed and right of way, and that defendant was desirous of building its road upon said strip. That plaintiff and defendant could not agree as to the amount of compensation to be paid to plaintiff for said strip, and defendant commenced proceedings in the circuit court of St. Louis county against plaintiff, the object and nature of which was to condemn a right of way upon said strip, and through and along plaintiff's said land. That commissioners were duly
81 appointed by said circuit court of St. Louis county, before whom the matter of compensation of plaintiff was to be heard, and before whom was then and there pending, among other things, the question of how much compensation plaintiff should receive from defendant—first, for actual amount of ground taken; second, for the injury to the property as a place of residence, caused by running the road where it now runs; third, for cutting up or dividing the property then owned by plaintiff into detached portions; fourth, for danger of fire for all time to come. That thereafter, to wit, on the 1st day of July, A. D. 1882, the said matters so pending before said commissioners were all compromised and settled between plaintiff and defendant upon the agreement that in consideration of all of said matters the defendant should pay plaintiff the sum of nine thousand dollars, in full payment, settlement, accord, and satisfaction of said right of way and said strip of land, and all the matters and things so pending before said commissioners as aforesaid. That thereafter, to wit, on the 15th day of July, A. D. 1882, defendant, for the consideration aforesaid, paid to said Leonard Mathews, and said Leonard Mathews received from the defendant, the said sum of nine thousand dollars, pursuant to and in compliance with said contract and agreement. Wherefore, defendant says the plaintiff ought not to prosecute or maintain said cause of action in said second count set out."

The replication was a general denial of all new matter set up in the answer.

Upon the trial, and when the plaintiff first offered testimony in his behalf, the defendant objected to the introduction of any testimony for the reasons "(1) that the petition does not state a cause of action; (2) that, in the first count, plaintiff has not specifically pleaded; (3) that he has combined two causes of action in one count, involving different rules of evidence, and different measures of damage; (4) that the law on which the second count is based is unconstitutional." These objections were overruled, and exceptions duly saved by defendant, and thereupon defendant moved the court to require plaintiff to elect between the two counts in his petition, "because the measure of damages in the alleged causes of action set forth in said petition are totally different, and because a different, and not the same, proof is required to support each of the said alleged causes of action." This motion was by the court overruled, and exception duly saved by defendant.

The testimony on the part of plaintiff tended to show that the plaintiff was the owner of a piece of real estate lying between the Pacific railroad on the north, and St. Louis & San Francisco railway on the south, Holmes avenue on the west, and the property of Anderson on the east; the northern part of this tract, containing about 11½ acres, and lying between the Pacific railroad and Elliott avenue, was called the "Home place," and was bounded by Osage-orange hedges on the south, east, and west. This home place had been improved and planted on plans prepared by a landscape gardener, and contained a large assortment of all kinds of ornamental trees, shrubbery, and plants, as well as fruit trees and vines. There was on it a large dwelling, of 19 rooms,—the front or main building made of concrete, and the rear building of frame, in imitation of stone; also, a large barn, of 75 feet in length by 30 feet in width, with a bowling alley therein, and a cow-shed attachment. There were also one or more outbuildings of no very considerable value, and in the house, barn, and bowling alley some personal property, to the amount of probably two or three hundred dollars in value. As is generally the case, the testimony as to the value of this house and barn, and of the property as a whole, with its improvements by planting, etc., was conflicting; plaintiff's witnesses putting the value of the house and barn alone as high as $18,000, and the value of the shrubbery, etc., destroyed, as high as $6,000. On the afternoon of August 9, 1887, at a time when everything was very dry, a fire started along the railroad track and on the railroad right of way adjoining plaintiff's property, and at a point southeast of the barn, and was carried by a south or southeast wind, with great rapidity, into plaintiff's property, set fire to the barn, and then to the house and outbuildings, and ran pretty much over the whole place, destroying the buildings, and much the larger part of the trees, plants, shrubbery, vines, etc. Albert B. Chandler testified: He was at home, south of the railroad, opposite Mr. Mathews' place, on the day of the fire. It started near where Elliott avenue crosses the railroad, and swept up the railroad bank there, and caught the Mathews barn, and burned it down, and the shingles flew from the barn, and burned the house. After the fire, he went down, and saw ashes on the track, and saw where the fire had burned up the bank. He stirred the ashes, and there were a few coals. When he first observed the fire, it was going up the railroad bank. Samuel K. Harding testified that on the 9th day of August, 1887, he was a brakeman in the employ of the defendant, and on that day was braking on a train which was called the "Hoodlum," and which passed plaintiff's place about 2 o'clock in the afternoon, and when it passed there he was on the rear part of the train, and saw some grass on fire on the defendant's right of way, opposite the Mathews place, about six or eight feet from the ends of the ties, on the bank in the cut. This fire was about three feet across. The engine gave out a great many sparks. He had noticed before that it gave out sparks. He had been running on that train since the 1st of August. The place was occupied by plaintiff as a residence up to 1880, when he removed to St. Louis, leaving a man named Cleary in charge of

the place. Cleary lived in the back part of the house, and took care of the place till 1883, when it was rented to a Mr. Wright, who lived there until September, 1884, from which time until the fire the place was vacant, except that some member of plaintiff's family would go out once in a while, and sometimes stay all night, and sometimes a week or two. After the fire, plaintiff sold the place for $9,000. There was verdict and judgment for plaintiff for $11,000. In due time motions for new trial and in arrest of judgment were filed, heard, and overruled, and defendant appealed to this court.

82 Among the grounds assigned for the reversal of the judgment of the circuit court, is the unconstitutionality of section 2615 of the Revised Statutes of 1889 (Laws 1887, p. 101,) which is as follows: "Each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages." It is argued by counsel that this act is unconstitutional for three reasons: "It impairs the obligation of a contract; it deprives defendant of its property without due process of law; it denies to defendant the equal protection of the laws." The defendant is a railroad corporation organized under the general laws of this State on the 10th of September, 1875, and prior to the passage of section 2615. The contention of the defendant raises a question of prime importance, and has received our most careful consideration.

Does section 2615 impair the obligation of the contract made by the State in the grant of defendant's charter? The claim is that it interferes with the right of defendant, granted in the sixth paragraph of section 2543, Rev. St. 1889, to propel its cars by steam, in subjecting it to an increased burden or liability for fires set out by its locomotives. Said paragraph is as follows: "Sixth. To take and convey persons and property on their railroad by the power or force of steam or of animals, or by any mechanical power, and to receive compensation therefor." Defendant insists that because there was no statute in force at the time it was organized which would render it liable for damages by fire in the absence of proof or presumption that it had been guilty of negligence in the operation of its trains, the construction of its engines, or the care of its right of way, and because the decisions of this court prior to the adoption of this section had never held it liable in such cases save for negligence, the law on this subject, as then understood, became part of its charter, and hence inviolable, under the Constitution of the United States.

It is wholly unnecessary to review the decisions which sustain the view adopted in the Dartmouth College case—that defendant's charter is a contract between it and the State. It has been uniformly followed by this court. This ground has been gone over so

often, and this limitation so thoroughly discussed, that nothing new can be said on the subject. Says Judge Cooley, in his great work on Constitutional Limitations, (6th ed., c. 16, pp. 707, 708:) "The occasions to consider this subject in its bearings upon the clause of the Constitution of the United States which forbids the States passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held, without dissent, that this clause does not so far remove from State control the rights and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important." "All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity." "Perhaps the most striking illustration of the principle here stated will be found among the judicial decisions which have held that the rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State with a view to the public protection, health, and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to *to* be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter contract, removed from the sphere of State regulations, and that the charter implies an undertaking on the part of the State that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues." "The obligation of the contract by no means extends so far; but on the contrary the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation, protection, and enjoyment." To this clear, lucid statement of the rule deduced from the decisions, little can be added, save to point out the various statutes that have
83 been held to be legitimate exercise of the police power inherent in the several States, which cannot be taken from them, in whole or in part, and cannot be exercised by Congress.

This identical question was before this court in Gorman *v.* Railroad Co., 26 Mo., 441. That was an action to recover the value of three head of cattle killed by the railroad company. It was alleged they were killed at a point on the road where it ran through inclosed fields; that defendant had failed to erect and maintain fences as required by law; that the cattle were killed by reason of this failure. The company denied that it was subject to the law of 1853, requiring railroad companies to fence their roads where they passed over inclosed fields. It was conceded that the company's charter

antedated the act of 1853, and, moreover, that the legislature, by the act of March 1, 1851, had yielded the right to suspend or repeal its charter. Sess. Acts 1851, p. 270, § 4. Judge Scott wrote the opinion of the court, and conceded that the charter was a contract between the State and the company, but held, notwithstanding, that the corporation, like natural persons, was subject to those regulations which the State may prescribe for the good government of the community. He says: "Where such dangerous and powerful agents as steam-engines are brought into use, there should be a power in the legislature to prescribe such reasonable regulations as will prevent injuries resulting from their employment." "The foresight of man is not competent to the task of prescribing in a charter all the regulations which time may show to be necessary for the security of the interests of the people of the State against injuries caused by the introduction of new, powerful, and dangerous agents for carrying on her intercourse and commerce." "The charter must be taken subject to the understanding that in its operation, affecting the interests of society, it will be, like individuals, liable to be controlled by such reasonable enactments as may be dictated by a sense of what is required for the preservation of the persons, lives, and property of the people, such enactments not contravening the expressed or plainly implied provisions of the charter." He cited with approval the case of Thorpe *v.* Railroad Co., 27 Vt. 140, in which Judge Redfield firmly and ably sustained the power of the State legislature to impose upon existing railroad companies the duty of maintaining fences, and to construct and maintain cattle-guards, as clearly within the police power of the State. The court also cited with approval the decision of the supreme judicial court of Massachusetts in Lyman *v.* Railroad Co., 4 Cush. 288, in which it was held that a statute "making the proprietors of railroads responsible for injuries by fire communicated from their locomotive engines applied to railroads established before as well as since its passage, and extends as well to estates, a part of which is conveyed by the owner, as to those of which a part is taken by authority of law for the purposes of a railroad." This statute of Massachusetts enacted in 1840 was the first to render the railroad companies liable for fires put out by their locomotives. It is important to note that the point was made in this first case that the act did not apply to charters granted before its passage, but the claim was denied, the court saying in its opinion that the act was "one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the steam-engine." "The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations and impose such liabilities for injuries suffered from the mode of using the road as the occasion and circumstances may reasonably justify." This act of 1840 has again and again been held valid, and enforced, by the supreme court of Massachusetts, and its constitutionality never seriously questioned since the first case. Hart *v.* Railroad Co., 13 Metc. (Mass.) 99; Ross *v.* Railroad Co., 6 Allen, 87; Pierce *v.* Rail-

road Co., 105 Mass. 199. The Massachusetts act was adopted by the legislature of Maine in 1842, and sustained by the supreme court of Maine in Chapman *v.* Railroad Co., 37 Me. 92, and in Pratt *v.* Railroad Co., 42 Me., 579, as binding equally upon corporations whose charters were granted prior to its enactment as to those subsequently organized. The act was adopted by New Hampshire as early as 1850, and enforced by its highest court, in Hooksett *v.* Railroad Co., 38 N. H. 242. It became the law of Iowa in 1873, (Code 1873, § 1289,) and received a most careful consideration by the supreme court of that State in Rodemacher *v.* Railroad Co., 41 Iowa, 297, and its constitutionality unanimously affirmed, as a valid exercise of the police power of the State, and applied as well to a company incorporated prior to the enactment as to one subsequently chartered. Drady *v.* Railroad Co., 57 Iowa, 393, 10 N. W. 754. The State of Connecticut also adopted the Massachusetts statute, in effect, in 1881. The constitutionality of the statute was challenged in Grissell *v.* Railroad Co. (Conn.) 9 Atl. 137, and fully sustained by the supreme court of that State. A statute similar in principle was upheld by the supreme court of Colorado in Railway Co. *v.* De Busk, 20 Pac. 752. In Railway Co. *v.* McClelland, 25 Ill. 140, an act requiring all railroads that were open for use to be fenced, and imposing a penalty for non-compliance, was considered; and it was held constitutional, the court saying, "To hold otherwise would be to say that the legislature might create an *imperium in imperio*."

These decisions all agree that subsequent acts imposing the duty to fence, and affixing penalties for a failure, are clearly within the police power of the State, subject to which all laws are enacted
84 in this State; and yet those acts imposed a burden and cost upon the roads, not named in their charters. These laws require the companies, at their own expense, to erect and maintain these fences along their roads. They are sustained on the ground that experience demonstrated that the operation of the roads with steam-engines resulted in great loss to the adjoining owners, in the destruction of their stock lawfully running in their fields, and was liable to cause loss of life, by wrecking trains. The damage by fires set out by trains comes within the same reasoning. It had not been anticipated to what extent engines would destroy the crops and property along the road, but when it was demonstrated that it was a common occurrence; that the company had the right to run its trains at all times of day and night; and that the injured party was powerless, often, to show negligence, on account of his inability to show what particular train had set out the fire, or the particular cause of the fire, and because the owner was entirely innocent, in the premises, of any negligence,—it was determined by the legislature that, when one of two innocent parties must suffer, the one who operated the dangerous agency should suffer the loss. Notwithstanding the great weight of authority that such an act is within the police power of the State, the defendant challenges it here. We are, however, not impressed with its reasons to the contrary. If the State is powerless to protect its citizens from the ravages of fires set out by agencies created by itself, then it fails to meet one of the essentials

of a good government. Certainly, it fails in the protection of property. The argument of the defendant, reduced to its last analysis, is this: The State authorized the railroad companies to propel cars by steam. To generate steam, they are compelled to use fire. Therefore, they can lawfully use fire, and as they are pursuing a lawful business, they are only liable for negligence in its operation, and when, in a given case, they can demonstrate they are guilty of no negligence, then they cannot be made liable. To this the citizen answers: "I also own my land lawfully. I have the right to grow my crops, and erect buildings on it, at any place I choose. I did not set in motion any dangerous machinery. You say you are guiltless of negligence. It results, then, that the State, which owes me protection to my property from others, has chartered an agency which, be it ever so careful and cautious and prudent, inevitably destroys my property, and yet denies me all redress. The State has no right to take or damage my property without just compensation." But, what the State cannot do directly, it attempts to do indirectly, through the charters granted to railroads, if defendant's contention be true. When it was demonstrated that although the railroads exercised every precaution in the construction of their engines, the choice of their operatives, and clearing their rights of way of all combustibles, still fire was emitted from their engines, and the citizen's property burned notwithstanding his efforts to extinguish it, and notwithstanding he had in no way contributed to setting it out, it is perfectly competent for the State to require the company who set out the fire to pay his damages. He is as much entitled to the protection from fire set out by engines as he is against the killing of his stock by those engines. Neither of these remedies was foreseen as necessary when the charters were granted, but experience has shown both are now necessary for the protection of the citizen; and the organic law of the State prescribed, before defendant obtained its charter, that "the exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the State." Const. Mo. art. 12, § 5. Let it be conceded, for it is true, that, prior to the enactment of section 2615, by the decisions of this and other courts, defendant was only liable for negligence in setting out fire. Is it to be concluded that the legislature is powerless to enact laws which will give ample protection to citizens against fires? Most certainly not. Fire, as one of the most dangerous elements, has ever been the subject of legislative control. It ought not to excite surprise among a people, the great body of whose laws had their origin in England, that those who set out fires which destroy the property of others should be held absolutely responsible for them. Such was the ancient common law, before any statutes were enacted. "If my fire, by misfortune, burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant or a guest, or any person who

entered the house with my consent; but otherwise if it is caused by a stranger, who entered the house against my will." Rolle, Abr. Action on the Case, B, tit. "Fire." Under ordinary circumstances, this was thought to be a harsh rule, and it was not generally adopted by the courts of the several States; but the question we are discussing is not what the courts have generally regarded as the reasonable rule, but what is the power of the law-making power to adopt as a correct one? In considering it, the dangerous character of fire must be kept in mind. Many laws have been sustained which were enacted to prevent destruction of property by fire, which at first blush seemed arbitrary, and infringing on natural right. Thus, the owner of a lot in a city may desire to build a frame or wooden
85 building upon it, but the municipal corporation may establish fire limits, and prevent the building of wooden buildings. City of Charleston *v.* Reed, 27 W. Va. 681; King *v.* Davenport, 98 Ill. 305; Knoxville Corp. *v.* Bird, 12 Lea, 121.

Counsel, in his brief, with great earnestness, insists that "no law can be sustained as a police regulation which imposes a penalty or confers an action for doing that which has never been declared unlawful, and which, on the contrary, is made legal." But has not counsel gone too far in his assumption? Is there anything in defendant's charter that exonerates it from damage by fire it may set out, or permits it to destroy with impunity? If there is, would not the charter itself be liable to the charge of unconstitutionality? Railroad Co. *v.* Dick, 9 Ind. 433. The right to use steam is granted, but it is granted subject to the right of the State to render the company liable for damages it may do in the use. The position of the defendant is that the law of the State permitting it to use steam in the operation of its trains is a protection from liability for fire set out by its engines, provided it is guilty of no negligence; and he invokes the principle that what the law authorizes cannot be a nuisance, although it may result in damages to individual rights or property. That there are cases where corporations acting in the performance of a public duty imposed upon them by the legislature, or in the exercise of a right conferred by law, and where persons appointed or authorized by law to perform a public duty or to do acts of a public character, are not responsible for consequential damages, if they act within their jurisdiction, and are guilty of no negligence or want of care, is certainly true. The cases sustaining this rule will generally be found to be those where municipal corporations were engaged in grading and improving public streets or highways, or where the act causing the injury was done by a corporation in the construction of its works upon property acquired under the power of eminent domain. Transportation Co. *v.* Chicago, 99 U. S. 635; Uline *v.* Railroad Co., 101 N. Y. 98; Conklin *v.* Railway Co., 102 N. Y. 107; Cooley, Const. Lim. (5th ed.) 671. But there is another rule of law, that has passed into a canon of construction, and of great utility in these days, when nearly all the business affairs of the country are carried on under corporate authority, and it is this: That "in the construction of grants by the legislature, whether public or private, only such rights and powers

can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant." Carroll *v.* Campbell, (Mo.) 17 S. W. 884; Fanning *v.* Gregoire, 16 How. 534; Minturn *v.* Larue, 23 How. 435. "And the rule is now established that the statutory authority which will justify an injury to private property, and afford immunity for acts which would otherwise be a nuisance, must be express, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury." Bohan *v.* Gaslight Co., 122 N. Y. 18; Cogswell *v.* Railroad Co., 103 N. Y. 10; Baltimore & P. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Hill *v.* Managers, 4 Q. B. Div. 433. In the case last cited, Lord Watson said: "When the terms of the statute are not imperative, but permissive; when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put to execution or not—I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected." It may be remarked that in the grant to defendant it is nowhere imperatively required and compelled, as argued by its counsel, to use steam. Its charter permits it "to convey persons by the force of steam or animals, or by any mechanical power." To charge that the legislature ever intended, by this grant, to authorize defendant to destroy the property of the adjoining land-owners by the use of fire, and deny them redress therefor according to well-settled principles of the common law, as evidenced by numerous decisions both in England and in the highest courts of this country, would be an imputation upon their sense of justice, and contrary to the ordinary rules of construction of such grants. No good reason can be shown, in my opinion, why the companies organized under this act should not be liable for the damage occasioned by their use of highly dangerous machinery; but most certainly the hands of all subsequent legislatures have not been so securely tied that they may not adopt a just and equitable rule in such cases, and not be charged with impairing the obligation of the State's contract with the railroad companies organized under the general law. Although the decisions of this court only held land-owners liable for fire set out by negligence, when this charter was granted, still there is nothing in the State or Federal Constitutions that can restrict the State to those regulations, and those only, existing at the time; but it has the right, in order to guard the property of its citizens along these roads, to adopt new regulations from time to time, as the necessity may require. The State has, and can have, no higher function than the duty to provide for the safety of its citizens and their property. All laws and all charters are passed subject to this duty, wherever it may arise.

Having come to the conclusion that this section in nowise impairs the obligation of the contract made in defendant's char-

86 ter, we are brought to the next contention,—that defendant is deprived of the equal protection of the law.

That the statute is not open to this serious charge, we think is clear. Defendant is brought into the same courts that are provided for other corporations and natural persons, upon the same process, and the plaintiff is required to make out his case according to the law of the land. If it could be shown that this statute imposes a burden upon railroads from which it exempts others under the same or similar circumstances, then it would be open to the criticism that it deprived the railroads of the equal protection of the law. But if the circumstances are different; if no other person, natural or artificial, is authorized to condemn or purchase a narrow strip of land through the lands of others on its route, and to run trains propelled by steam over its road at all times of day or night, and at all seasons, wet or dry, and using engines that scatter fire and burn property, although operated with a degree of care that amounts to "faultlessness," all for its own profit,—then we assert that the statute is not obnoxious to the charge of denying the railroads the protection it accords to others. So long as the State imposes this duty upon the only agency that has like powers, and creating similar hazards, it cannot be charged with inequality or unjust discrimination. This is a familiar rule in taxation, where uniformity and equality are required by the constitution. The statute applies to all railroads in this State,—a class of carriers operating 133 railroads, with a mileage of 6,125 miles, in 1890. If it essayed to render only one road liable, it would be open to the objection; but, as it is, it might as well be said that a statute regulating the practice of medicine, or peddlers, is unconstitutional. This objection was overruled in Railway Co. *v.* Emmons, 13 Sup. Ct. 870, 149 U. S. 364. The example cited by counsel as a similar case is that of a steamboat operated by steam. Nothing could well be more dissimilar in their surroundings than a railroad and a steamboat. The one is propelled upon the water, upon which the sparks from its smokestacks fall, and are instantly extinguished. The other runs along and beside fields full of grain, dry straw, and other highly combustible material, upon which the sparks light, and cinders are blown, at places and at times when it is almost impossible for the owner to be present, and guard against the damages. It seems to us the example emphasizes the dangerous exception which railroads constitute to all other persons using steam as a means of transportation.

Finally, is it unconstitutional because it deprives defendant of its property "without due process of law," or in defiance of "the law of the land?" We accept Mr. Webster's definition of the "law of the land:" "By 'law of the land' is most clearly intended the general law,—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confis-

cation, acts reversing judgments, and acts directly transferring one man's estate to another,—legislative judgments, decrees, and forfeitures, in all possible forms,—would be the law of the land." "Such a strange construction would render the constitutional provisions of the highest importance completely inoperative and void. Judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country." We cheerfully concede that, if this act comes within this definition, it is our sworn duty to declare it void and inoperative, notwithstanding the high respect we have and owe to the legislative and executive branches of our Government, which enacted and approved this act. Let us subject this statute to the test.

At common law, if a person use a highly dangerous machine, he must do so at the peril of the consequences, if it cause injury to others. Fletcher *v.* Rylands, L. R. 1 Exch. 265, L. R. 3 H. L. Cas. 330, and the authorities referred to in Com. Dig. tit. "Action on the case for negligence," A 6. But when the legislature expressly authorized railroads, in this State, to operate and propel their cars by locomotive engines, it was ruled by our courts that the roads were only liable for negligence in setting out fire upon the premises of adjoining owners in the absence of specific legislation to the contrary. And here lies the real contention of defendant in this case: It is that it is not competent for the legislature or law-making power to attach an absolute liability. We have seen that at common law the liability for fire was absolute. In Jones *v.* Railway Co., L. R. 3 Q. B. 733, Blackburn, J., said: "The general rule of the common law is correctly given in Fletcher *v.* Rylands, L. R. 1 Exch. 265–279, affirmed in House of Lords, L. R. 3 H. L. Cas. 330,—that, when a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his peril, and is liable for the consequences if it escapes, and does injury to his neighbor." "Here the defendants were using a locomotive engine, with no express parliamentary powers making lawful that use, and they are therefore, at common law, bound to keep the engines from doing injury; and if the sparks escape, and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part." It took acts of Parliament (6 Anne, c. 31, and 14 Geo. III. c. 78) in England to repeal this absolute liability for fire accidentally set out on one's own prem-
87 ises, and extending upon his adjoining proprietor. But, if Parliament might repeal, it might also re-enact. By Gen. St. Conn. 1875, p. 489, § 6, one who kindles a fire on his own land is made liable for all damages it may do if it runs upon the land of another, and proof of negligence is not required. A similar statute was passed in Iowa, and sustained in Conn. *v.* May, 36 Iowa, 241. When the legislature passed the general railroad act giving them the right to use steam, had it also annexed as a condition that the railroads should be absolutely liable for all damages they might cause by fire set out by them, would any one have questioned its power to do so? Had it been done then, would it not have been a valid exercise of its police power? No violation of the obligation

of the contract could be charged in that case, and, if it be a valid exercise of police power, all the authorities, and defendant's counsel, agree that the State is not restricted from asserting it by reason of the prior grant of the charter, for all charters are subject to it.

Does it, then, contravene natural right? Is it open to the indictment preferred by defendant,—that it arbitrarily takes its property, and confers it upon another, without a hearing or consideration? We have seen that it was the ancient common law that the owner was liable for fire escaping from his own premises, whether negligent or not, and that different States in the Union have re-enacted the old common law, by which the owner is now absolutely liable for damage by fire put out on his own premises. Looking for the reason underlying the ancient rule of law, we find that it had its origin in the dangerous character of fire, and that whosoever put this dangerous agency in motion was rightfully required to see that it did no harm; that while it was an elementary principle that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property, the mode of enjoyment was necessarily limited by the rights of others, otherwise it might result in the destruction of their rights altogether. Hence the maxim, "*Sic utere tuo non laedas alienum.*" So that while it has been generally held that one is only liable for negligence, in the prosecution of a lawful business, nothing is more firmly settled than that a man cannot erect a nuisance or employ dangerous agencies, to the annoyance of an adjoining proprietor, even for the purposes of a lawful trade; and it was an old common-law maxim that, where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who occasioned the injury, rather than upon the one who had no agency in producing the damage. Counsel for defendant, in his earnest denunciation of the act as violative of every principle of justice, and indefensible as a police regulation, says: "But we are not aware that this principle of '*Sic utere*,' etc., has ever been extended so far as to make a man liable for the lawful and careful use of his own property." In Hay *v.* Cohoes Co., 2 N. Y. 159, the court of appeals of New York had this case before it: The defendant was a corporation chartered by the legislature, and authorized to construct a canal. In the construction of the canal, they resorted to blasting, and threw stone, gravel, and slate upon the house and premises of plaintiff. He brought his action without alleging negligence. The defendant moved for a nonsuit, insisting that it was necessary both to aver and prove negligence and wantonness, and plaintiff had failed to do either. The trial court nonsuited plaintiff. The court of appeals reversed the case, saying: "The defendant had a right to dig the canal. Plaintiff had a right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land, than that another should be deprived of the use of his altogether, which might be the consequence of the privilege of the former should he be wholly unrestricted." In Tremain *v.* Cohoes Co., 2 N. Y., at page 163, the de-

fendants offered to prove "that the work was done in the best and most careful manner." The common pleas court rejected it as irrelevant, as the declaration neither averred willfulness nor negligence. The court of appeals sustained the common pleas court, and held it was not necessary to charge or prove negligence, to recover. In McAndrews *v.* Collerd, 42 N. J. Law, 189, these two cases in New York were reviewed and approved. In the New Jersey case, the Delaware, Lackawanna & Western Railroad Company was authorized by its charter to construct a tunnel through Berger hill. It contracted with McAndrews to do the work. The tunnel was driven through rock; was begun in 1873, and finished in 1877. McAndrews constructed near the eastern end of the tunnel, and within the limits of Jersey City, a magazine for explosive materials which he used for blasting. In 1875, at night, the materials exploded, doing damage to property, and, among others, injured Collerd's houses. In a suit by Collerd for damages, it was held: "(1) That the legislative authority to a private corporation or an individual to do work for its or his own profit does not include authority to use, at whatever hazard to the persons or property of others, dangerous materials, even though they are necessary to the convenient prosecution of the work. (2) They will be liable for injury, although no negligence or want of skill in executing the work is proved, and liable for actual damages, even though they show that they have done the work in the most careful manner." In Heeg *v.* Licht, 80 N. Y. 579, the action was sustained upon the ground that the manufacturing and storing of fireworks, and the use and keeping of materials of a dangerous and explosive character for that purpose, constituted a private nuisance, for which the defendant was liable to respond in damages, without regard to the question whether he was chargeable with negligence or carelessness. The defendant had constructed a powder magazine upon his premises, with the usual safeguards, in which he kept stored a quantity of powder, which, without apparent cause, exploded and caused the injury. The court says: "The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a personal nuisance." "In such case, the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application." It is significant that the argument employed by the court in that case to show the dangerous character of the magazine, and for that reason to take it out of the rule that exonerates one in a lawful business from liability, save for negligence, is identically the same used by defendant in this case to escape liability. It admits that it uses fire in its engines, and that the utmost care cannot and does not prevent its destroying the property of adjoining proprietors, and yet insists, because it is engaged in a lawful business, it can only be made liable for negligence. See also Bohan *v.* Gaslight Co., 122 N. Y. 18; Powder Co. *v.* Tearney, 131 Ill. 322. We think it is clear that, upon the plainest principles of

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justice, it ought to be liable, and that when experience demonstrated the dangerous character of the locomotive engine, in setting out fire, it was not only the right, but the manifest duty, of the legislature, to hold the railroad liable for fires set out by them, without reference to whether they were guilty of negligence or not. Nor do we think there is any force in the argument that by so doing their property is arbitrarily taken without right. The right to compel them to respond is based upon their use of a dangerous element, and by their destruction of adjoining proprietors' property. Moreover, it is not done in an arbitrary manner. The plaintiff is required to show to a jury or court organized as in any other case that the road did set out the fire; that it did destroy his property; and the jury must, from the evidence, determine the amount of the damage. In no sense is it a finding without a hearing, nor are the essentials to a recovery based upon unreasonable or untenable grounds. In a word, he is simply called upon to respond to a legal duty established by proofs. The wrong done by the dangerous agency set in motion by the company, and under its control, is ample consideration for the compensation it is required by the statute to make the owner whose property it destroys.

But, were it without compensation, it would not follow that the statute would be void. Many instances to the contrary were enumerated in Boston & M. R. Co. *v.* York County Com'rs, 79 Me. 386; 2 R'y & Corp. Journal, 210, in which it was held that the legislature might lawfully require railroads to fence their tracks, although the act was subsequent to the charter, and although it imposed a burden and expense on the company not existing when it was incorporated. Emery, J., says: "The wide extent of the police power can be illustrated by instances of its actual exercise without direct compensation." Many of these instances are too familiar to need citations of authorities. He enumerates those cases in which licenses to manufacture liquor have been recalled, and the manufacture prohibited, after much expenditure by the licensees. Beer Co.'s case, 97 U. S. 33. Lotteries chartered for a consideration paid have been suppressed. Stone's case, 101 U. S. 814. The various inspection laws, by which dealers are required to pay the inspection fees. Dealers using weights and measures must have them approved, and pay the approving officer. The blameless sufferer from a contagious disease is often compelled to leave home and friends, and bear his pain in some quarantine hospital, and his clothing destroyed all at his own expense. The right of municipalities to destroy buildings, to prevent spread of fire, in an emergency. The owners of theaters, hotels, and other public buildings are required, at their own expense, to provide fire escapes and more ample means of exit. Steamboats are subject to inspection, and must pay the fees therefor. Railroads are constantly having imposed upon them additional duties with reference to safety of persons and property. New inventions in brakes, switches; blocking their switches, etc. Pierce, R. R., 462, 463. In this State, the action for damages in case of death was given after many of the old charters were granted, which must have greatly increased the cost of run-

ning the road, and yet Judge Scott says no one questioned that the act was constitutional.

2. But it is contended by the appellant that the legislature never intended to make the fact of the injury anything more than *prima facie* evidence of negligence; that the circuit court erred in holding that proof of care and diligence on part of the defendant railroad would not relieve it of liability under the statute. If this is all that was in the contemplation of the legislature, it was a work of supererogation, because it has been the settled law of decision in this court since the determination in Fitch *v.* Railroad Co. 45 Mo., 322 (in 1870), "that, where it is proved that the property was destroyed by fire escaping from the defendant's engine, a *prima facie* case of negligence is made out; that the burden is then thrown on defendant, by its evidence, to rebut the presumption of negligence by showing the absence of negligence." Coale *v.* Railroad Co., 60 Mo.
89 227; Clemens *v.* Railroad Co., 53 Mo. 366; Randle *v.* Railroad Co., 65 Mo. 325; Miller *v.* Railway Co., 90 Mo. 389. In the light of this judicial history, and of the history of the act itself, we think the legislature meant more than this mere *prima facie* liability. Section 2615 is a rescript of the Massachusetts act. That act had been adopted in other New England States and in Iowa, and a construction given it that rendered the railroad companies liable, independent of the question of negligence, for damages occasioned by fires set out by them. It is a familiar rule of construction in this State that when the legislature enacts a statute which is a transcript of a statute of another State, that has received a known judicial construction by the courts of that State, it is deemed that our legislature adopted that construction as an integral part of its act. State *v.* Macon County Court, 41 Mo. 453; Skouten *v.* Woods, 57 Mo. 380; West *v.* McMullen, 112 Mo. 405; Rodemacher *v.* Railroad Co., 41 Iowa, 297; Grissell *v.* Railroad Co., (Conn.) 9 Atl. 137; *Ibid. v. Ibid.*, 32 Am. & Eng. R'y Cas. 349; Railway Co. *v.* De Busk, (Colo.) 20 Pac. 752; Hooksett *v.* Railroad Co., 38 N. H. 242; Rowell *v.* Railroad Co., 57 N. H. 132; Lyman *v.* Railroad Corp., 4 Cush. 288. We are confirmed in our views by the reasoning of the learned judge in Small *v.* Railroad Co., 50 Iowa, 338. He shows that in Iowa the court had not, previous to the statute, held the fact of the fire *prima facie* evidence of negligence, and the language of the statute is made the turning point. Nothing, however, said in that case, in our opinion, destroys the force of Judge Day's decision in Rodemacher *v.* Railroad Co., 41 Iowa, 297.

3. Appellant complains of a ruling of the court in excluding certain evidence. It offered to prove by Howard Blossom, an insurance agent, that trees, shrubs, plants, and vines were, by their inherent nature, not susceptible of insurance, and it was impracticable, from a business standpoint, to insure such classes of property, and why it is so impracticable. Upon objection that this evidence was immaterial and irrelevant, the court excluded it, and defendant excepted. It is not contended by defendant that "trees, shrubs, plants, and vines" are not property, often of great value, and that, as such, they would not be included in the general term "property,"

used in the statute, but it urges that such property is not insurable. Its offer was to show that the inherent nature of such property is uninsurable. The act under consideration is not limited to any specific property. It is broad enough to include both real and personal property. The statute is an enabling act. By its terms the property becomes a subject of insurance. The mere fact that no person has as yet applied for insurance upon growing timber and ornamental shrubs would not meet the case. This character of property is of inherent value, adds greatly to the value of realty and certainly is not more subject to change than ordinary personal property, which is clearly insurable. That this class of property is subject to destruction by fire, all must admit, and no valid reason appears why it may not be insured. We take it that it is not an open question, under this statute, and no error was committed in declining to hear the evidence offered. The judge and jury would be as competent to respond to that question as any witness. Such property was held clearly within a similar statute in Maine, and insurable, in Pratt *v.* Railroad Co., 42 Me. 579—a case much later than that cited by defendant from 37 Me. 92, and following Hart *v.* Railroad Co., 13 Metc. (Mass.) 99. Chief Justice Bigelow, in Ross *v.* Railroad Co., 6 Allen, 87, pointed out the difficulties in which the supreme court of Maine had become involved by attempting to confine the right of recovery to permanent property, and repudiated any such limited construction. He maintained that the statute was broad enough to cover every species of property, and the claim for indemnity was as strong in one as in the other. The evidence, if permitted, would have led to a distinction unauthorized by anything in the statute, which is remedial in its nature, and not to be strictly construed against those for whose benefit it was enacted. It becomes unnecessary to say more in regard to the point that the personal property in the house was not insurable. The personal property that was burned was stored in the residence and barn, and no reason is given why it was not insurable. The defendant's point as to this is not sustained.

4. On the trial, defendant introduced witnesses who testified that they lived in the neighborhood of the Mathews home place; that it had been neglected for years prior to August 9, 1887, and no care taken of it, except to mow the meadow and lawn around the house; that the garden, nursery, and orchard had been permitted to grow up in weeds, some of which were two or three years old, and on the day of the fire were very dry; that the place was a resort for boys, who frequented it to swim in the pond, and, in the fall, to hunt; that the weeds and inflammable material at the southeast corner, near the nursery, ran right down to the defendant's right of way. At the conclusion of the evidence, defendant asked two instructions to the effect that the conduct of plaintiff in permitting these weeds to grow on his place, as above testified, constituted such contributory negligence as would prevent plaintiff's recovery, or, if such weeds augmented the loss, he could only recover for so much of the injury as would have followed, had he not been negligent in that regard. The circuit court declined to give either of said instructions,

and defendant complains of that ruling. The instructions are predicated on the fact that the jury should first find that the fire was
90 communicated by defendant's engine to this grass or weeds, but assumes that it was contributory negligence in plaintiff to permit these weeds to grow upon his land in this manner. This question has often been before this court, beginning with Fitch *v.* Railroad Co., 45 Mo. 322; and it has uniformly been ruled that it was not contributory negligence in a farmer to permit dead and dry grass to remain in his fields adjoining the right of way, "especially," as was said in Patton *v.* Railway Co., 87 Mo. 117, "when there is no evidence that this is out of the usual course of husbandry." These decisions of this court are amply supported by both reason and authority in other States. In Railroad Co. *v.* Medley, 75 Va. 499, Judge Waller R. Staples delivered the opinion of the court. It appeared in that case that the plaintiff's land was covered with dry grass and broom-sedge; that this grass was of a highly combustible nature, and easily ignited. The point was made that plaintiff was guilty of contributory negligence, but the court held otherwise, saying: "The legislature, in legalizing the use of engines running through the country, scattering fire and cinders on all sides over lands in the vicinity of the road, certainly did not intend to impose any additional burdens or duties upon the owners of such lands." "They are subject only to such risks as are necessarily incidental to the proper and legitimate operation of the road by those having charge of it." "Any other rule would impose upon property-holders near the line of a railroad the necessity of removing their grain, hay, and whatever is of a combustible nature, to some distant point—not infrequently, of changing the whole course of husbandry, of incurring enormous expenses, and of exercising ceaseless vigilance—in order that the company may negligently permit the accumulation of dangerously inflammable matter upon its own lands, liable at any moment to be ignited from its own locomotives." "It has been well said that fire is an extremely dangerous element, even when employed for a lawful purpose. The exercise of due care is imposed on him who uses it, and sets it in motion for his own advantage, and not upon him who is merely passive, confining himself to lawful employment and business in the conduct of his own affairs." "There are some few cases holding a contrary doctrine, but the great weight of authority is in conformity with the views here expressed. I refer particularly to an exhaustive discussion of the whole subject by Chief Justice Dixon in Kellogg *v.* Railroad Co., 26 Wis. 223; also, to a very able opinion of Judge Haymond in Snyder *v.* Railway Co., 11 W. Va. 14; Salmon *v.* Railway Co., 38 N. J. Law, 5, and 39 N. J. Law, 299." In Railroad Co. *v.* Schultz, 93 Pa. St. 341, the supreme court of Pennsylvania characterized the claim of defendant that plaintiff was guilty of contributory negligence because he permitted dry leaves, brushwood, and other rubbish on his property, which could be readily fired by sparks from its locomotive, as "an extraordinary proposition," assigning, among other reasons, that "it was an attempt to impose upon property-owners along the line of a railroad duties unknown and unnecessary before

the building of the road," and, "if this proposition means anything, it means that upon such property-owners devolves the duty of guarding against the negligence of railroad companies and their servants, which is absurd;" and citing Judge Agnew's opinion in Railway Co. *v.* Hendrickson, 80 Pa. St. 182. See, also, Railroad Co. *v.* Jones, 86 Ind. 496; Vaughan *v.* Railroad Co., 3 Hurl. & N. 750; Railway Co. *v.* Hixon, 79 Ind. 111. It will be observed that defendant's own witnesses testified to the mowing of the grass and meadow, and the only accumulation was in the nursery, garden, vineyard, and orchard. As remarked in Patton's case, *supra*, there was no evidence whatever that it was not customary, or even proper, at times, to let weeds grow. Certainly, it cannot be affirmed that weeds, even, are not often put to a most useful purpose, in mulching and manuring. In any aspect of the case, we think there was nothing showing contributory negligence by the plaintiff. But there is another ground upon which this plea should have been denied, and that is, by virtue of section 2615, the defendant is made an insurer against fire set out by its engines; and it is a familiar rule that contributory negligence, short of fraud, does not furnish any defense to an action by the insured on his policy of insurance, and this was the view taken and enforced in Rowell *v.* Railroad Co., 57 N. H. 132.

5. In this connection, we are called upon to consider the position taken by defendant in the fourth paragraph of its answer, which is, in brief, that, at the time of the fire, plaintiff was insured in certain insurance companies to the amount of $10,000; that, after said fire, said companies paid said loss of $10,000. Wherefore, defendant prays that the insurance money so paid to plaintiff by said insurance companies shall be applied *pro tanto* to the damages sued for in this case. The defendant is most clearly not entitled to any benefit of the insurance money which accrued to plaintiff by reason of defendant's own act in destroying the insured property. In Dillon *v.* Hunt, 105 Mo. 154, 16 S.W. 516, this division held the rule as stated in 1 Suth. Dam. 242 (ed. 1882), to be correct, viz: "That there can be no abatement of damages on the principle of partial compensation received for the injury, when it comes from a collateral source, wholly independent of the defendant, and is, as to him, *res inter alios acta*. The payment of such moneys not being procured by the defendant, and they not having been paid or received to satisfy in whole or in part his liability, he can derive no benefit therefrom,
91 in mitigation of damages for which he is liable. To permit a reduction on such a ground would be to allow a wrongdoer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." A similar conclusion had previously been reached in Carroll *v.* Railway Co., 88 Mo. 239, to which our attention was not called at the time. Although an insurer, defendant, having itself destroyed the property, has no right to share the immunity afforded other insurers. Their relation as to this loss is entirely antagonistic to it. The defendant's liability is first and principal; that of the insurance companies, secondary. Plaintiff and the insurance companies who paid his

loss stand opposed to defendant, who was the cause of loss to both. There is no contractural relation or principle of subrogation that will enable defendant to require of them that they shall share their losses *pro tanto* with it. The statute points out the way by which it may protect itself against the loss. It confers on it an insurable interest in the property, and only by availing itself of this right can it guard against those losses which occur by fires put out by it on the lands of adjoining owners. May, Ins. § 445; Harding *v.* Townshend, 43 Vt. 536; The Monticello *v.* Mollison, 17 How. 152; Hammond *v.* Schiff (N. C.), 6 S. E. 753; Hart *v.* Railroad Co., 13 Metc. (Mass.) 105; Ross *v.* Railroad Co., 6 Allen, 90.

6. At the trial, defendant offered to prove that its right of way was a portion of the property described in plaintiff's petition; that when its railroad was built through plaintiff's premises, in 1882, condemnation proceedings were instituted against plaintiff, to which he was made a party; that before the commissioners appointed to assess plaintiff's among other items of damage caused by defendant's road, plaintiff claimed, as one, "damage of fire for all time to come." Defendant then offered to show by H. W. Hough and W. T. Essex, two of said commissioners, that they awarded plaintiff, for his damages to all his property, $9,000, and for this home place they assessed the damage at $3,000; that in estimating the damage they took into consideration the danger to said property from accidental fire set out by engines on the railroad; that plaintiff and defendant finally agreed to abide the award, and the damages were accordingly paid. The court was requested to charge the jury, in the second instruction prayed by defendant and refused by the court, that if the commissioners did assess the damages, and in so doing took into consideration the danger to plaintiff's property by accidental fire, and said danger was also considered by plaintiff and defendant, then plaintiff cannot recover, provided such proceedings and compromise were had prior to March 31, 1887. When a part of a tract of land is taken for railroad purposes under condemnation proceedings, the jury or commissioners may properly take into consideration the risk from fire to the buildings, fences, timber, or crops upon the remainder, in so far and to the extent, only, that it depreciates the value of the property; but compensation for a probable or future loss by fire is entirely too speculative and remote to be made the basis of damages. As said in Railway Co. *v.* McGrew, 104 Mo. 282, *loc. cit.* 294, 15 S. W. 931: "It would not be proper to estimate the possible damage from fires or injuries to persons." "Neither may ever occur, and to take them into the estimate would be mere speculation." "We think they may properly be considered, however, in so far as they tend to depreciate the value of the whole property, and to affect the proposed changes, but no further." Lewis, Em. Dom. § 497; Mills, Em. Dom. §§ 163–166; Railroad Co. *v.* McComb, 60 Me. 290; Adden *v.* Railroad Co., 105 Mass. 199; Railway Co. *v.* McCloskey, 110 Pa. St. 436, 1 Atl. 555. The plaintiff's claim before the commissioners was damage from the risk of fire. In so far as that risk affected the value of his property not taken, by depreciating it, it

was a proper claim. There was nothing to show that it was unjustly extended to an estimate of damages that might accrue at some future time, or might never occur. The damages assessed were $3,000, and paid. After the assessment, then, plaintiff held his property in its depreciated condition. How defendant can arrive at the conclusion that if this property, in its depreciated condition, is subsequently destroyed, plaintiff is not entitled to recover whatever damages shall accrue from such subsequent destruction, we cannot understand. The prior condemnation assessment has been made and settled. After that, plaintiff owns what is left, absolutely, as he owned the whole before a portion was appropriated by the road. The subsequent damages constitute no part of the first. It is not double damages, in any sense, as we view it. If the property is destroyed by negligence, there can be no question of the liability of the company for burning it, nor is it material, under section 2615, whether it was the result of negligence or pure accident. The statute operates upon the estate as it is when the fire occurs, and, as we hold the statute valid, the company is liable. Railroad Co. *v.* McComb, 60 Me. 290; Adden *v.* Railroad Co., 55 N. H. 413; Grissell *v.* Railroad Co. (Conn.), 9 Atl. 137; Pierce *v.* Railroad Co., 105 Mass. 199; Lyman *v.* Railroad Corp., 4 Cush. 288. We find no error in the judgment of the circuit court, and accordingly affirm it.

Burgess, J., concurs. Sherwood, J., dissents.

JAS. B. GANTT, *Judge.*

92 And afterwards, to wit, on the 25th day of November, 1893, the following proceedings were had in said cause, viz:

LEONARD MATHEWS, Resp.,
vs.
ST. L. & SAN F. R'Y CO., App.

Comes now the said appellant, by attorney, and files its motion to transfer this cause to the court in banc.

Which said motion to transfer this cause to the court in banc is in words and figures as follows, to wit:

In the Supreme Court of Missouri, Division No. 2, October Term, A. D. 1893.

LEONARD MATTHEWS, Respondent,
against
THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, Appellant.

Now comes the appellant and respectfully represents that the judgment of the circuit court in the above-entitled cause was on the 14th day of December, 1893, affirmed by this court, one of the judges of this division of this court dissenting from the opinion rendered therein. Wherefore, the appellant being the loser, it respectfully

prays that this cause shall be transferred to the court in banc; and, as in duty bound, will ever pray.

E. D. KENNA &
L. F. PARKER,
Attorney- for Appellant.

And afterwards, to wit, on the 7th day of December, 1893, the following further proceedings were had in said cause, viz:

LEONARD MATHEWS, Resp.,
vs.
ST. L. & SAN F. R'Y Co., App.

93 Now, at this day, the court, having fully considered and understood the motion heretofore filed to transfer this cause to the court in banc, doth order that said motion be, and the same is hereby, sustained.

And afterwards, to wit, on the 5th day of March, 1894, in the supreme court in banc the following further proceedings were had in said cause, viz:

LEONARD MATHEWS, Resp.,
vs.
ST. L. & SAN F. R'Y Co., App.

Come now the said parties, by attorneys, and after argument herein submit this cause to the court.

And afterwards, to wit, on the 24th day of March, 1894, the following further proceedings were had in said cause, viz:

LEONARD MATHEWS, Respondent,
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Appellant.
Appeal from Circuit Court, City of St. Louis.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said circuit court of the city of St. Louis rendered, be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellant his costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures following, to wit:

94 In the Supreme Court of Missouri, October Term, 1893. In Banc.

LEONARD MATHEWS, Respondent,
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Appellant.

This is an action for damages caused by the destruction and injury to plaintiff's property, a suburban residence and grounds near

the city of St. Louis, in St. Louis county, by fire alleged to have been set out by an engine operated by the defendant on its railroad. The petition contains two counts; the first being an action at common law, charging "that on the 9th day of August, 1887, and for a long time prior thereto, defendant negligently suffered a large amount of dry grass, weeds, and rubbish to accumulate and remain upon and along its railway and right of way adjoining the land of the plaintiff, and used and employed, in operating said railway, locomotive engines and other machinery that were improperly and negligently constructed, so that sparks of fire could and did needlessly escape said engines," and that by reason of such negligence fire was communicated to said dry grass, weeds, and rubbish, and extended to plaintiff's land, and destroyed a dwelling-house, barn, outbuildings, personal property therein, trees, and shrubbery, of the value of $30,000, for which judgment is prayed. The second count is based upon the statute, (Rev. St. 1889, § 2615,) and charges that the defendant owned and operated a railroad adjoining plaintiff's land, "having locomotive engines in use on the same, and on said 9th day of August, 1887, fire was communicated from a locomotive engine then in use upon said railroad, owned and operated by defendant as aforesaid, to plaintiff's property on his said land," and then avers the destruction of the same property, of the same value as charged in the first count, and avers damages in, and prays judgment for, the same amount

The answer admits the incorporation of defendant, and the operation of the line of railway described in the petition, and the use of locomotive engines thereon, and denies generally every other allegation in the petition, and then, as special defenses to each count of the petition, avers: "(1) That plaintiff has assigned to persons to this defendant unknown his right of action against this defendant, if any he ever had, and is neither a necessary nor proper party plaintiff herein, and is not the real party in interest, and is not, therefore, entitled to maintain or prosecute this action. (2) That there is a defect of plaintiff, in this, to wit, that the Detroit Fire & Marine Insurance Company, the Commercial Union Insurance Company, and the Imperial Fire Insurance Company, and each and every one of them, are parties in interest in this case, and are necessary parties plaintiff herein. (3) That, on the date and at the time in the petition mentioned, there were growing and standing upon the property in said petition described, adjacent to and continuous from the right of way of defendant to the house, shrubbery, and trees of plaintiff in his petition described, large quantities of dry grass, leaves, weeds, and other combustible and highly inflammable matter, which were carelessly and negligently allowed to grow and accumulate upon said premises by and with the knowledge and consent of plaintiff; that the accumulation of dry, combustible, and highly inflammable matter as aforesaid had been carelessly and negligently allowed to remain upon said premises for a long time previous to the 9th day of August, 1887, to wit, for many years; that it was gross negligence for plaintiff to allow said dry and combustible matter to accumulate and remain upon his said premises

without taking precautions to prevent the spread of fire which might accidentally be set upon the right of way of defendant railway company, or which might accidentally escape from passing engines, which said negligence of plaintiff did proximately and directly contribute to the injuries of which he complains. (4) That the said dwelling-house, barn, and outbuildings in the petition described were on the 9th day of August, 1887, insured in certain insurance companies named in the answer for the aggregate sum of $10,000, which, as defendant avers, was greatly in excess of the real value of said dwelling-house, barn, and outbuildings; that said insurance companies, after the fire in plaintiff's petition alleged, paid to said plaintiff the sum of $10,000 on account of the loss sustained by reason of the burning of said dwelling-house, barn, and outbuildings as aforesaid. Wherefore, defendant says that the sum so paid by the said insurance companies as aforesaid should be applied *pro tanto* to the satisfaction of plaintiff's claim, if any he has, which defendant denies."

And the answer, in addition to the above counts, which are common to both counts of the petition, contains the following counts, which are addressed to the second count of the petition only: "(5) Defendant avers that the alleged cause of action set forth in the second count of the petition is founded on an act of the legislature of the State of Missouri entitled 'An act to establish the responsibilities of railroad companies and persons owning or operating railroads for damages by fire communicated by locomotive engines,' approved March 31, 1887, which act defendant avers is illegal, unconstitutional, and void, in that it seeks to deprive the defendant of its property without due process of law, and is contrary to the provisions of section 30, art. 2, of the constitution of the State of Missouri. (6) That the said act of the legislature is illegal, unconstitutional, and
95 void, in that it denies the defendant the equal protection of the law, contrary to the provisions of section 1, art. 14, of the amendments to the Constitution of the United States; and in this: that it deprives defendant of its property without due process of law, contrary to the provisions of article 5 of the amendments to the Constitution of the United States; and in this: that it impairs the obligations of a contract made between the State of Missouri and defendant, by the terms of which it was impliedly agreed that said defendant might and could use fire for the purpose of generating steam to propel locomotive engines, and cars attached thereto, and be responsible only for the negligent and careless use thereof; and is contrary to the provisions of article 1, § 10, of the Constitution of the United States. (7.) That heretofore, to wit, on the 1st day of June, A. D. 1882, the plaintiff was the owner of the land described in his petition, and also of a certain strip of land along and adjacent to the west side of said tract, 100 feet wide, being the same strip of land now occupied by defendant's road-bed and right of way, and that defendant was desirous of building its road upon said strip. That plaintiff and defendant could not agree as to the amount of compensation to be paid to plaintiff for said strip, and defendant commenced proceedings in the circuit court of St. Louis

county against plaintiff, the object and nature of which was to condemn a right of way upon said strip, and through and along plaintiff's said land. That commissioners were duly appointed by said circuit court of St. Louis county, before whom the matter of compensation of plaintiff was to be heard, and before whom was then and there pending, among other things, the question of how much compensation plaintiff should receive from defendant—First, for actual amount of ground taken; second, for the injury to the property as a place of residence, caused by running the road where it now runs; third, for cutting up or dividing the property then owned by plaintiff into detached portions; fourth, for danger of fire for all time to come. That thereafter, to wit, on the 1st day of July, A. D. 1882, the said matters so pending before said commissioners were all compromised and settled between plaintiff and defendant upon the agreement that in consideration of all of said matters the defendant should pay plaintiff the sum of nine thousand dollars, in full payment, settlement, accord, and satisfaction of said right of way and said strip of land, and all the matters and things so pending before said commissioners as aforesaid. That thereafter, to wit, on the 15th day of July, A. D. 1882, defendant, for the consideration aforesaid, paid to said Leonard Mathews, and said Leonard Mathews received from the defendant, the said sum of nine thousand dollars, pursuant to and in compliance with said contract and agreement. Wherefore, defendant says the plaintiff ought not to prosecute or maintain said cause of action in said second count set out."

The replication was a general denial of all new matter set up in the answer.

Upon the trial, and when the plaintiff first offered testimony in his behalf, the defendant objected to the introduction of any testimony for the reasons (1) that the petition does not state a cause of action; (2) that, in the first count, plaintiff has not specifically pleaded; (3) that he has combined two causes of action in one count, involving different rules of evidence, and different measures of damage; (4) that the law on which the second count is based is unconstitutional. These objections were overruled, and exceptions duly saved by defendant, and thereupon defendant moved the court to require plaintiff to elect between the two counts in his petition, because the measure of damages in the alleged causes of action set forth in said petition are totally different, and because a different, and not the same, proof is required to support each of the said alleged causes of action. This motion was by the court overruled, and exception duly saved by defendant.

The testimony on the part of plaintiff tended to show that the plaintiff was the owner of a piece of real estate lying between the Pacific railroad on the north, and the St. Louis & San Francisco railway on the south, Holmes avenue on the west, and the property of Anderson on the east; the northern part of this tract, containing about 11½ acres, and lying between the Pacific railroad and Elliott avenue, was called the "Home place," and was bounded by Osage-orange hedges on the south, east, and west. This Home place had

been improved and planted on plans prepared by a landscape gardener, and contained a large assortment of all kinds of ornamental trees, shrubbery, and plants, as well as fruit trees and vines. There was on it a large dwelling, of 19 rooms,—the front or main building made of concrete, and the rear building of frame, in imitation of stone; also a large barn, of 75 feet in length by 30 feet in width, with a bowling alley therein, and a cow-shed attachment. There were also one or more outbuildings of no very considerable value, and in the house, barn, and bowling alley some personal property, to the amount of probably two or three hundred dollars in value. As is generally the case, the testimony as to the value of this house and barn, and of the property as a whole, with its improvements by planting, etc., was conflicting; plaintiff's witnesses putting the value of the house and barn alone as high as $18,000, and the value of the shrubbery, etc., destroyed, as high as $6,000. On the afternoon of August 9, 1887, at a time when everything was very dry, a fire started along the railroad track and on the railroad right of way adjoining plaintiff's property, and at a point southeast of the barn, and was carried by a south or southeast wind, with great rapidity, into plaintiff's property, set fire to the barn, and then to the house and outbuildings, and ran pretty much over the whole place, destroying the buildings, and much the larger part of the trees, plants, shrubbery, vines, etc. Albert B. Chandler testified: He was at home, south of the railroad, opposite Mr. Mathews' place, on the day of the fire. It started near where Elliott avenue crosses the railroad, and swept up the railroad bank there, and caught the Mathews barn, and burned it down, and the shingles flew from the barn, and burned the house. After the fire, he went down, and saw ashes on the track, and saw where the fire had burned up the bank. He stirred the ashes, and there were a few coals. When he first observed the fire, it was going up the railroad bank. Samuel K. Harding testified that on the 9th day of August, 1887, he was a brakeman in the employ of the defendant, and on that day was braking on a train which was called the "Hoodlum," and which passed plaintiff's place about 2 o'clock in the afternoon, and when it passed there he was on the rear part of the train, and saw some grass on fire on the defendant's right of way, opposite the Mathews place, about six or eight feet from the ends of the ties, on the bank in the cut. This fire was about three feet across. The engine gave out a great many sparks. He had noticed before that it gave out sparks. He had been running on that train since the 1st of August. The place was occupied by plaintiff as a residence up to 1880, when he removed to St. Louis, leaving a man named Cleary in charge of the place. Cleary lived in the back part of the house, and took care of the place, till 1883, when it was rented to a Mr. Wright, who lived there until September, 1884, from which time until the fire
the place was vacant, except that some member of plaintiff's
96 family would go out once in a while, and sometimes stay all
night, and sometimes a week or two. After the fire, plaintiff sold the place for $9,000. There was verdict and judgment for plaintiff for $11,000. In due time, motions for new trial and in

arrest of judgment were filed, heard, and overruled, and defendant appealed to this court.

Among the grounds assigned for the reversal of the judgment of the circuit court, is the unconstitutionality of section 2615 of the Revised Statutes of 1889 (Laws 1887, p. 101), which is as follows: "Each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages." It is argued by counsel that this act is unconstitutional for three reasons: "It impairs the obligation of a contract; it deprives defendant of its property without due process of law; it denies to defendant the equal protection of the laws." The defendant is a railroad corporation organized under the general laws of this State on the 10th of September, 1876, and prior to the passage of section 2615. The contention of the defendant raises a question of prime importance, and has received our most careful consideration.

Does section 2615 impair the obligation of the contract made by the State in the grant of defendant's charter? The claim is that it interferes with the right of defendant, granted in the sixth paragraph of section 2543, Rev. St. 1889, to propel its cars by steam, in subjecting it to an increased burden or liability for fires set out by its locomotives. Said paragraph is as follows: "Sixth. To take and convey persons and property on their railroad by the power or force of steam or animals, or by any mechanical power, and to receive compensation therefor." Defendant insists that because there was no statute in force at the time it was organized which would render it liable for damages by fire in the absence of proof or presumption that it had been guilty of negligence in the operation of its trains, the construction of its engines, or the care of its right of way, and because the decisions of this court prior to the adoption of this section had never held it liable in such cases save for negligence, the law on this subject, as then understood, became part of its charter, and hence inviolable, under the Constitution of the United States.

It is wholly unnecessary to review the decisions which sustain the view adopted in the Dartmouth College case—that defendant's charter is a contract between it and the State. It has been uniformly followed by this court. This ground has been gone over so often, and this limitation so thoroughly discussed, that nothing new can be said on the subject. Says Judge Cooley, in his great work on Constitutional Limitations, (6th ed., c. 16, pp. 707, 708): "The occasions to consider this subject in its bearings upon the clause of the Constitution of the United States which forbids the States passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held, without dissent, that this clause does nor so far remove from State control the rights

and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important." "All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity." "Perhaps the most striking illustration of the principle here stated will be found among the judicial decisions which have held that the rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State with a view to the public protection, health, and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter contract removed from the sphere of State regulations, and that the charter implies an undertaking on the part of the State that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues." "The obligation of the contract by no means extends so far; but on the contrary the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation, protection, and enjoyment." To this clear, lucid statement of the rule deduced from the decisions, little can be added, save to point out the various statutes that have been held to be legitimate exercise of the police or remedial power inherent in the several States, which cannot be taken from them, in whole or in part, and cannot be exercised by Congress.

This identical question was before this court in Gorman *v.* Railroad Co., 26 Mo., 441. That was an action to recover the value of three head of cattle killed by the railroad company. It was alleged they were killed at a point on the road where it ran through inclosed fields; that defendant had failed to erect and maintain fences as required by law; that the cattle were killed by reason of this failure. The company denied that it was subject to the law of 1853, requiring railroad companies to fence their roads where they passed over inclosed fields. It was conceded that the company's charter antedated the act of 1853, and, moreover, that the legislature, by the act of March 1, 1851, had yielded the right to suspend or repeal its charter. Sess. Acts 1851, p. 270, § 4. Judge Scott wrote the opinion of the court, and conceded that the charter was a contract between the State and the company, but held, notwithstanding, that the corporation, like natural persons, was subject to those regulations which the State may prescribe for the good government of the community. He says: "Where

such dangerous and powerful agents as steam-engines are brought into use, there should be a power in the legislature to prescribe such reasonable regulations as will prevent injuries resulting from their employment." "The foresight of
97 man is not competent to the task of prescribing in a charter all the regulations which time may show to be necessary for the security of the interests of the people of the State against injuries caused by the introduction of new, powerful, and dangerous agents for carrying on her intercourse and commerce." "The charter must be taken subject to the understanding that in its operation, affecting the interests of society, it will be, like individuals, liable to be controlled by such reasonable enactments as may be dictated by a sense of what is required for the preservation of the persons, lives, and property of the people, such enactments not contravening the expressed or plainly implied provisions of the charter." He cited with approval the case of Thorpe *v.* Railroad Co., 27 Vt. 140, in which Judge Redfield firmly and ably sustained the power of the State legislature to impose upon existing railroad companies the duty of maintaining fences, and to construct and maintain cattle-guards, as clearly within the police power of the State. The court also cited with approval the decision of the supreme judicial court of Massachusetts in Lyman *v.* Railroad Co., 4 Cush. 288, in which it was held that a statute making the proprietors of railroads responsible for injuries by fire communicated from their locomotive engines applied to railroads established before as well as since its passage, and extends as well to estates, a part of which is conveyed by the owner, as to those of which a part is taken by authority of law for the purposes of a railroad. This statute of Massachusetts enacted in 1840 was the first to render the railroad companies liable for fires put out by their locomotives. It is important to note that the point was made in this first case that the act did not apply to charters granted before its passage, but the claim was denied, the court saying in its opinion that the act was "one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the steam-engine." "The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations and impose such liabilities for injuries suffered from the mode of using the road as the occasion and circumstances may reasonably justify." This act of 1840 has again and again been held valid, and enforced, by the supreme court of Massachusetts, and its constitutionality never seriously questioned since the first case. Hart *v.* Railroad Co., 13 Metc. (Mass.) 99; Ross *v.* Railroad Co., 6 Allen, 87; Pierce *v.* Railroad Co., 105 Mass. 199. The Massachusetts act was adopted by the legislature of Maine in 1842, and sustained by the supreme court of Maine in Chapman *v.* Railroad Co., 37 Me. 92, and in Pratt *v.* Railroad Co., 42 Me. 579, as binding equally upon corporations whose charters were granted prior to its enactment as to those subsequently organized. The act was adopted by New Hampshire as early as 1850, and enforced by its highest court, in Hooksett *v.* Railroad Co., 38 N. H. 242. It be-

came the law of Iowa in 1873, (Code 1873, § 1289,) and received a most careful consideration by the supreme court of that State in Rodemacher *v.* Railroad Co., 41 Iowa, 297, and its constitutionality unanimously affirmed, as a valid exercise of the police power of the State, and applied as well to a company incorporated prior to the enactment as to one subsequently chartered. Drady *v.* Railroad Co., 57 Iowa, 393, 10 N. W. 754. The State of Connecticut also adopted the Massachusetts statute, in effect, in 1881. The constitutionality of the statute was challenged in Grissell *v.* Railroad Co. (Conn.) 9 Atl. 137, and fully sustained by the supreme court of that State. A statute similar in principle was upheld by the supreme court of Colorado in Railway Co. *v.* De Busk, 20 Pac. 752. In Railway Co. *v.* McClelland, 25 Ill. 140, an act requiring all railroads that were open for use to be fenced, and imposing a penalty for non-compliance, was considered; and it was held constitutional, the court saying, "To hold otherwise would be to say that the legislature might create an *imperium in imperio*."

These decisions all agree that subsequent acts imposing the duty to fence, and affixing penalties for a failure, are clearly within the police power of the State, subject to which all laws are enacted in this State; and yet those acts imposed a burden and cost upon the roads, not named in their charters. These laws require the companies, at their own expense, to erect and maintain these fences along their roads. They are sustained on the ground that experience demonstrated that the operation of the roads with steam-engines resulted in great loss to the adjoining owners, in the destruction of their stock lawfully running in their fields, and was liable to cause loss of life, by wrecking trains. The damage by fires set out by trains comes within the same reasoning. It had not been anticipated to what extent engines would destroy the crops and property along the road, but when it was demonstrated that it was a common occurrence; that the company had the right to run its trains at all times of day and night; and that the injured party was powerless, often, to show negligence, on account of his inability to show what particular train had set out the fire, or the particular cause of the fire; and because the owner was entirely innocent, in the premises, of any negligence,—it was determined by the legislature that, when one of two innocent parties must suffer, the one who operated the dangerous agency should suffer the loss. Notwithstanding the great weight of authority that such an act is within the police power of the State, the defendant challenges it here. We are, however, not impressed with its reasons to the contrary. If the State is powerless to protect its citizens from the ravages of fires set out by agencies created by itself, then it fails to meet one of the essentials of a good government. Certainly, it fails in the protection of property. The argument of the defendant, reduced to its last analysis, is this: The State authorized the railroad companies to propel cars by steam. To generate steam, they are compelled to use fire. Therefore, they can lawfully use fire, and, as they are pursuing a lawful business, they are only liable for negligence in its operation, and when, in a given case, they can demonstrate they are

guilty of no negligence, then they cannot be made liable. To this the citizen answers: "I also own my land lawfully. I have the right to grow my crops, and erect buildings on it, at any place I choose. I did not set in motion any dangerous machinery. You say you are guiltless of negligence. It results, then, that the State, which owes me protection to my property from others, has chartered an agency which, be it ever so careful and cautious and prudent, inevitably destroys my property, and yet denies me all redress. The State has no right to take or damage
98 my property without just compensation." But, what the State cannot do directly, it attempts to do indirectly, through the charters granted to railroads, if defendant's contention be true. When it was demonstrated that although the railroads exercised every precaution in the construction of their engines, the choice of their operatives, and clearing their rights of way of all combustibles, still fire was emitted from their engines, and the citizen's property burned notwithstanding his efforts to extinguish it, and notwithstanding he had in no way contributed to setting it out, it is perfectly competent for the State to require the company who set out the fire to pay his damages. He is as much entitled to the protection from fire set out by engines as he is against the killing of his stock by those engines. Neither of these remedies was foreseen as necessary when the charters were granted, but experience has shown both are now necessary for the protection of the citizen; and the organic law of the State prescribed, before defendant obtained its charter, that "the exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State." Const. Mo. art. 12, § 5. Let it be conceded, for it is true, that, prior to the enactment of section 2615, by the decisions of this and other courts, defendant was only liable for negligence in setting out fire. Is it to be concluded that the legislature is powerless to enact laws which will give ample protection to citizens against fires? Most certainly not. Fire, as one of the most dangerous elements, has ever been the subject of legislative control. It ought not to excite surprise among a people, the great body of whose laws had their origin in England, that those who set out fires which destroy the property of others should be held absolutely responsible for them. Such was the ancient common law, before any statutes were enacted. "If my fire, by misfortune, burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant or a guest, or any person who entered the house with my consent; but otherwise if it is caused by a stranger, who entered the house against my will." Rolle, Abr. Action on the Case, B, tit. "Fire." Under ordinary circumstances, this was thought to be a harsh rule, and it was not generally adopted by the courts of the several States; but the question we are discussing is not what the courts have gen-

erally regarded as the reasonable rule, but what is the power of the law-making power to adopt as a correct one? In considering it, the dangerous character of fire must be kept in mind. Many laws have been sustained which were enacted to prevent destruction of property by fire, which at first blush seemed arbitrary, and infringing on natural right. Thus, the owner of a lot in a city may desire to build a frame or wooden building upon it, but the municipal corporation may establish fire limits, and prevent the building of wooden buildings. City of Charleston *v.* Reed, 27 W. Va. 681; King *v.* Davenport, 98 Ill. 305; Knoxville Corp. *v.* Bird, 12 Lea, 121.

Counsel, in his brief, with great earnestness, insists that "no law can be sustained as a police regulation which imposes a penalty or confers an action for doing that which has never been declared unlawful, and which, on the contrary, is made legal." But has not counsel gone too far in his assumption? Is there anything in defendant's charter that exonerates it from damage by fire it may set out, or permits it to destroy with impunity? If there is, would not the charter itself be liable to the charge of unconstitutionality? Railroad Co. *v.* Dick, 9 Ind. 433. The right to use steam is granted, but it is granted subject to the right of the State to render the company liable for damages it may do in the use. The position of the defendant is that the law of the State permitting it to use steam in the operation of its trains is a protection from liability for fire set out by its engines, provided it is guilty of no negligence; and he invokes the principle that what the law authorizes cannot be a nuisance, although it may result in damages to individual rights or property. That there are cases where corporations acting in the performance of a public duty imposed upon them by the legislature, or in the exercise of a right conferred by law, and where persons appointed or authorized by law to perform a public duty or to do acts of a public character, are not responsible for consequential damages, if they act within their jurisdiction, and are guilty of no negligence or want of care, is certainly true. The cases sustaining this rule will generally be found to be those where municipal corporations were engaged in grading and improving public streets or highways, or where the act causing the injury was done by a corporation in the construction of its works upon property acquired under the power of eminent domain. Transportation Co. *v.* Chicago, 99 U. S. 635; Uline *v.* Railroad Co., 101 N. Y. 98; Conklin *v.* Railway Co., 102 N. Y. 107, Cooley, Const. Lim. (5th ed.) 671. But there is another rule of law, that has passed into a canon of construction, and of great utility in these days, when nearly all the business affairs of the country are carried on under corporate authority, and it is this: That "in the construction of grants by the legislature, whether public or private, only such rights and powers can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant." Carroll *v.* Campbell, (Mo.) 17 S. W. 884; Fanning *v.* Gregoire, 16 How. 534; Minturn *v.* Larue, 23 How. 435. "And the rule is now established that the

statutory authority which will justify an injury to private property, and afford immunity for acts which would otherwise be a nuisance, must be express, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury." Bohan *v.* Gaslight Co., 122 N. Y. 18; Cogswell *v.* Railroad Co., 103 N. Y. 10; Baltimore & P. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Hill *v.* Managers, 4 Q. B. Div. 433. In the case last cited, Lord Watson said: "When the terms of the statute are not imperative, but permissive; when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put to execution or not—I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected." It may be remarked that in the grant to defendant it is nowhere imperatively required and compelled, as argued by its counsel, to use steam. Its charter permits it

"to convey persons by the force of steam or animals,
99 or by any mechanical power." To charge that the legislature ever intended, by this grant, to authorize defendant to destroy the property of the adjoining land-owners by the use of fire, and deny them redress therefor according to well-settled principles of the common law, as evidenced by numerous decisions both in England and in the highest courts of this county, would be an imputation upon their sense of justice, and contrary to the ordinary rules of construction of such grants. No good reason can be shown, in my opinion, why the companies organized under this act should not be liable for the damage occasioned by their use of highly dangerous machinery; but most certainly the hands of all subsequent legislatures have not been so securely tied that they may not adopt a just and equitable rule in such cases, and not be charged with impairing the obligation of the State's contract with the railroad companies organized under the general law. Although the decisions of this court only held land-owners liable for fire set out by negligence, when this charter was granted, still there is nothing in the State or Federal constitutions that can restrict the State to those regulations, and those only, existing at the time; but it has the right, in order to guard the property of its citizens along these roads, to adopt new regulations from time to time, as the necessity may require. The State has, and can have, no higher function than the duty to provide for the safety of its citizens and their property. All laws and all charters are passed subject to this duty, wherever it may arise.

Having come to the conclusion that this section in nowise impairs the obligation of the contract made in defendant's charter, we are brought to the next contention,—that defendant is deprived of the equal protection of the law.

That the statute is not open to this serious charge, we think is clear. Defendant is brought into the same courts that are provided for other corporations and natural persons, upon the same process,

and the plaintiff is required to make out his case according to the law of the land. If it could be shown that this statute imposes a burden upon railroads from which it exempts others under the same or similar circumstances, then it would be open to the criticism that it deprived the railroads of the equal protection of the law. But if the circumstances are different; if no other person, natural or artificial, is authorized to condemn or purchase a narrow strip of land through the lands of others on its route, and to run trains propelled by steam over its road at all times of day or night, and at all seasons, wet or dry, and using engines that scatter fire and burn property, although operated with a degree of care that amounts to "faultlessness," all for its own profit,—then we assert that the statute is not obnoxious to the charge of denying the railroads protection it accords to others. So long as the State imposes this duty upon the only agency that has like powers, and creating similar hazards, it cannot be charged with inequality or unjust discrimination. This is a familiar rule in taxation, where uniformity and equality are required by the constitution. The statute applies to all railroads in this State,—a class of carriers operating 133 railroads, with a mileage of 6,125 miles, in 1890. If it essayed to render only one road liable, it would be open to the objection; but, as it is, it might as well be said that a statute regulating the practice of medicine, or peddlers, is unconstitutional. This objection was overruled in Railway Co. *v.* Emmons, 13 Sup. Ct. 870, 149 U. S. 364. The example cited by counsel as a similar case is that of a steamboat operated by steam. Nothing could well be more dissimilar in their surroundings than a railroad and a steamboat. The one is propelled upon the water, upon which the sparks from its smokestacks fall, and are instantly extinguished. The other runs along and beside fields full of grain, dry straw, and other highly combustible material, upon which the sparks light, and cinders are blown, at places and at times when it is almost impossible for the owner to be present, and guard against the damages. It seems to us the example emphasizes the dangerous exception which railroads constitute to all other persons using steam as a means of transportation.

Finally, is it unconstitutional because it deprives defendant of its property "without due process of law," or in defiance of "the law of the land"? We accept Mr. Webster's definition of the "law of the land:" "By 'law of the land' is most clearly intended the general law,—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another,—legislative judgments, decrees, and forfeitures, in all possible forms,—would be the law of the land." "Such a strange construction would render the constitutional pro-

visions of the highest importance completely inoperative and void. Judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country." We cheerfully concede that, if this act comes within this definition, it is our sworn duty to declare it void and inoperative, notwithstanding the high respect we have and owe to the legislative and executive branches of our Government, which enacted and approved this act. Let us subject this statute to the test.

At common law, if a person use a highly dangerous machine, he must do so at the peril of the consequences, if it cause injury to others. Fletcher *v.* Rylands, L. R. 1 Exch. 265, L. R. 3 H. L. Cas. 330, and the authorities referred to in Com. Dig. tit. "Action on the case for negligence," A 6. But when the legislature expressly authorized railroads, in this State, to operate and propel their cars by locomotive engines, it was ruled by our courts that the roads were only liable for negligence in setting out fire upon the premises of adjoining owners in the absence of specific legislation to the contrary. And here lies the real contention of defendant in this case: It is that it is not competent for the legislature or law-making power to attach an absolute liability. We have seen that at common law the liability for fire was absolute. In Jones *v.* Railway Co., L. R. 3 Q. B. 733, Blackburn, J., said: "The general rule of the common law is correctly given in Fletcher *v.* Rylands, L. R. 1 Exch. 265–279, affirmed in House of Lords, L. R. 3 H. L. Cas. 330,—that, when a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his peril, and is liable for the consequences if it escapes, and does injury to his neighbor." "Here the defendants were using a locomotive engine, with no express
100 parliamentary powers making lawful that use, and they are therefore, at common law, bound to keep the engines from doing injury; and if the sparks escape, and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part." It took acts of Parliament (6 Anne, c. 31, and 14 Geo. III, c. 78) in England to repeal this absolute liability for fire accidentally set out on one's own premises, and extending upon his adjoining proprietor. But, if Parliament might repeal, it might also re-enact. By Gen. St. Conn. 1875, p. 489, § 6, one who kindles a fire on his own land is made liable for all damages it may do if it runs upon the land of another, and proof of negligence is not required. A similar statute was passed in Iowa, and sustained in Conn. *v* May, 36 Iowa, 240. When the legislature passed the general railroad act giving them the right to use steam, had it also annexed as a condition that the railroads should be absolutely liable for all damages they might cause by fire set out by them, would any one have questioned its power to do so? Had it been done then, would it not have been a valid exercise of its police power? No violation of the obligation of the contract could be charged in that case, and, if it be a valid exercise of police power, all the authorities, and defendant's counsel, agree that the State is not restricted from asserting it by reason of the prior grant of the charter, for all charters are subject to it.

Does it, then, contravene natural right? Is it open to the indictment preferred by defendant,—that it arbitrarily takes its property, and confers it upon another, without a hearing or consideration? We have seen that it was the ancient common law that the owner was liable for fire escaping from his own premises, whether negligent or not, and that different States in the Union have re-enacted the old common law, by which the owner is now absolutely liable for damage by fire put out on his own premises. Looking for the reason underlying the ancient rule of law, we find that it had its origin in the dangerous character of fire, and that whosoever put this dangerous agency in motion was rightfully required to see that it did no harm; that while it was an elementary principle that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property, the mode of enjoyment was necessarily limited by the rights of others, otherwise it might result in the destruction of their rights altogether. Hence the maxim, "*Sic utere tuo non laedas alienum.*" So that while it has been generally held that one is only liable for negligence, in the prosecution of lawful business, nothing is more firmly settled than that a man cannot erect a nuisance or employ dangerous agencies, to the annoyance of an adjoining proprietor, even for the purposes of a lawful trade; and it was an old common-law maxim that, where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who occasioned the injury, rather than upon the one who had no agency in producing the damage. Counsel for defendant, in his earnest denunciation of the act as violative of every principle of justice, and indefensible as a police regulation, says: "But we are not aware that this principle of '*Sic utere*,' etc., has ever been extended so far as to make a man liable for the lawful and careful use of his own property." In Hay *v.* Cohoes Co., 2 N. Y. 159, the court of appeals of New York had this case before it: The defendant was a corporation chartered by the legislature, and authorized to construct a canal. In the construction of the canal, they resorted to blasting, and threw stone, gravel, and slate upon the house and premises of plaintiff. He brought his action without alleging negligence. The defendant moved for a nonsuit, insisting that it was necessary both to aver and prove negligence and wantonness, and plaintiff had failed to do either. The trial court nonsuited plaintiff. The court of appeals reversed the case, saying: "The defendant had a right to dig the canal. Plaintiff had a right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land, than that another should be deprived of the use of his altogether, which might be the consequence of the privilege of the former should he be wholly unrestricted." In Tremain *v.* Cohoes Co., 2 N. Y., at page 163, the defendants offered to prove "that the work was done in the best and most careful manner." The common pleas court rejected it as irrelevant, as the declaration neither averred willfulness nor negligence. The court of appeals sustained the common pleas court,

and held it was not necessary to charge or prove negligence, to recover. In McAndrews *v.* Collerd, 42 N. J. Law, 189, these two cases in New York were reviewed and approved. In the New Jersey case, the Delaware, Lackawanna & Western Railroad Company was authorized by its charter to construct a tunnel through Berger hill. It contracted with McAndrews to do the work. The tunnel was driven through rock; was begun in 1873, and finished in 1877. McAndrews constructed near the eastern end of the tunnel, and within the limits of Jersey City, a magazine for explosive materials which he used for blasting. In 1875, at night, the materials exploded, doing damage to property, and, among others, injured Collerd's houses. In a suit by Collerd for damages, it was held: "(1) That the legislative authority to a private corporation or an individual to do work for its or his own profit does not include authority to use, at whatever hazard to the persons or property of others, dangerous materials, even though they are necessary to the convenient prosecution of the work. (2) They will be liable for injury, although no negligence or want of skill in executing the work is proved, and liable for actual damages, even though they show that they have done the work in the most careful manner." In Heeg *v.* Licht, 80 N. Y. 579, the action was sustained upon the ground that the manufacturing and storing of fireworks, and the use and keeping of materials of a dangerous and explosive character for that purpose, constituted a private nuisance, for which the defendant was liable to respond in damages, without regard to the question whether he was chargeable with negligence or carelessness. The defendant had constructed a powder magazine upon his premises, with the usual safeguards, in which he kept stored a quantity of powder, which, without apparent cause, exploded and caused the injury. The court says: "The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a personal nuisance." "In such case, the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application." It is significant that the argument employed by the court in that case to show the dangerous character of the magazine, and for that reason to take it out of the rule that exonerates one in a lawful business from liability, save for negligence, is identically the same used by defendant in this case to escape liability. It admits that it uses fire in its en-
101 gines, and that the utmost care cannot and does not prevent its destroying the property of adjoining proprietors, and yet insists, because it is engaged in a lawful business, it can only be made liable for negligence. See, also, Bohan *v.* Gaslight Co., 122 N. Y. 18; Powder Co. *v.* Tearney, 131 Ill. 322. We think it is clear that, upon the plainest principles of justice, it ought to be liable, and that when experience demonstrated the dangerous character of the locomotive engine, in setting out fire, it was not only the right, but the manifest duty, of the legislature, to hold the railroads liable for fires set out by them, without reference to whether they were guilty of negligence or not. Nor do we think there is any force in the argu-

ment that by so doing their property is arbitrarily taken without right. The right to compel them to respond is based upon their use of a dangerous element, and by their destruction of adjoining proprietors' property. Moreover, it is not done in an arbitrary manner. The plaintiff is required to show to a jury or court organized as in any other case that the road did set out the fire; that it did destroy his property; and the jury must, from the evidence, determine the amount of the damage. In no sense is it a finding without a hearing, nor are the essentials to a recovery based upon unreasonable or untenable grounds. In a word, he is simply called upon to respond to a legal duty established by proofs. The wrong done by the dangerous agency set in motion by the company, and under its control, is ample consideration for the compensation it is required by the statute to make the owner whose property it destroys.

But, were it without compensation, it would not follow that the statute would be void. Many instances to the contrary were enumerated in Boston & M. R. Co. *v.* York County Com'rs, 79 Me. 386; 2 R'y & Corp. Journal, 210; in which it was held that the legislature might lawfully require railroads to fence their tracks, although the act was subsequent to the charter, and although it imposed a burden and expense on the company not existing when it was incorporated. Emery, J., says, "The wide extent of the police power can be illustrated by instances of its actual exercise, without direct compensation." Many of these instances are too familiar to need citations of authorities. He enumerates those cases in which licenses to manufacture liquor have been recalled and the manufacture prohibited, after much expenditure by the licensese. Beer Co's case, 97 U. S. 33. Lotteries chartered for a consideration paid have been suppressed. Stone's case, 101 U. S. 814. The various inspection laws, by which dealers are required to pay the inspection fees. Dealers using weights and measures must have them approved, and pay the approving officer. The blameless sufferer from a contagious disease is often compelled to leave home and friends, and bear his pain in some quarantine hospital, and his clothing destroyed, all at his own expense. The right of municipalities to destroy buildings, to prevent spread of fire, in an emergency. The owners of theaters, hotels, and other public buildings are required, at their own expense, to provide fire escapes, and more ample means of exit. Steamboats are subject to inspection, and must pay the fees therefor. Railroads are constantly having imposed upon them additional duties with reference to safety of persons and property. New inventions in brakes, switches; blocking their switches, etc. Pierce R. R. 462, 463. In this State, the action for damages in case of death was given after many of the old charters were granted, which must have greatly increased the cost of running the road, and yet Judge Scott says no one questioned that the act was constitutional.

2. But it is contended by the appellant that the legislature never intended to make the fact of the injury anything more than *prima facie* evidence of negligence; that the circuit court erred in holding that proof of care and diligence on part of the defendant railroad would not relieve it of liability under the statute. If this is all

that was in the contemplation of the legislature, it was a work of supererogation, because it has been the settled law of decision in this court since the determination in Fitch *v.* Railroad Co. 45 Mo. 322, (in 1870), "that, where it is proved that the property was destroyed by fire escaping from the defendant's engine, a *prima facie* case of negligence is made out; that the burden is then thrown on defendant, by its evidence, to rebut the presumption of negligence by showing the absence of negligence." Coale *v.* Railroad Co., 60 Mo. 227; Clemens *v.* Railroad Co., 53 Mo. 366; Randle *v.* Railroad Co., 65 Mo. 325; Miller *v.* Railway Co., 90 Mo. 389. In the light of this judicial history, and of the history of the act itself, we think the legislature meant more than this mere *prima facie* liability. Section 2615 is a rescript of the Massachusetts act. That act had been adopted in other New England States and in Iowa, and a construction given it that rendered the railroad companies liable, independent of the question of negligence, for damages occasioned by fires set out by them. It is a familiar rule of construction in this State that when the legislature enacts a statute which is a transcript of a statute of another State, that has received a known judicial construction by the courts of that State, it is deemed that our legislature adopted that construction as an integral part of its act. State *v.* Macon County Court, 41 Mo. 453; Skouten *v.* Woods, 57 Mo. 380; West *v.* McMullen, 112 Mo. 405; Rodemacher *v.* Railroad Co., 41 Iowa, 297; Grissell *v.* Railroad Co. (Conn.), 9 Atl. 137; *Ibid v. Ibid*, 32 Am. & Eng. R'y Cas. 349; Railway Co. *v.* De Busk (Colo.), 20 Pac. 752; Hooksett *v.* Railroad Co., 38 N. H. 242; Rowell *v.* Railroad Co., 57 N. H. 132; Lyman *v.* Railroad, 4 Cush. 288. We are confirmed in our views by the reasoning of the learned judge in Small *v.* Railroad Co., 50 Iowa, 338. He shows that in Iowa the court had not, previous to the statute, held the fact of the fire *prima facie* evidence of negligence, and the language of the statute is made the turning point. Nothing, however, said in that case, in our opinion, destroys the force of Judge Day's decision in Rodemacher *v.* Railroad Co., 41 Iowa, 297.

3. Appellant complains of a ruling of the court in excluding certain evidence. It offered to prove by Howard Blossom, an insurance agent, that trees, shrubs, plants, and vines were, by their inherent nature, not susceptible of insurance, and it was impracticable, from a business standpoint, to insure such classes of property, and why it is so impracticable. Upon objection that this evidence was immaterial and irrelevant, the court excluded it, and defendant excepted. It is not contended by defendant that "trees, shrubs, plants, and vines" are not property, often of great value, and that, as such, they would not be included in the general term "property," used in the statute, but it urges that such property is not insurable. Its offer was to show that the inherent nature of such property is uninsurable. The act under consideration is not limited to any specific property. It is broad enough to include both real and personal property. The statute is an enabling act. By its terms the property becomes a subject of insurance. The mere fact that no person has as yet applied for insurance upon growing timber and

ornamental shrubs would not meet the case. This character of property is of inherent value, adds greatly to the value of realty,
102 and certainly is not more subject to change than ordinary personal property, which is clearly insurable. That this class of property is subject to destruction by fire, all must admit, and no valid reason appears why it may not be insured. We take it that it is not an open question, under this statute, and no error was committed in declining to hear the evidence offered. The judge and jury would be as competent to respond to that question as any witness. Such property was held clearly within a similar statute in Maine, and insurable, in Pratt *v.* Railroad Co., 42 Me. 579,—a case much later than that cited by defendant from 37 Me. 92, and following Hart *v.* Railroad Co., 13 Metc. 99. Chief Justice Bigelow, in Ross *v.* Railroad Co., 6 Allen, 87, pointed out the difficulties in which the supreme court of Maine had become involved by attempting to confine the right of recovery to permanent property, and repudiated any such limited construction. He maintained that the statute was broad enough to cover every species of property, and the claim for indemnity was as strong in one as in the other. The evidence, if permitted, would have led to a distinction unauthorized by anything in the statute, which is remedial in its nature, and not to be strictly construed against those for whose benefit it was enacted. It becomes unnecessary to say more in regard to the point that the personal property in the house was not insurable. The personal property that was burned was stored in the residence and barn, and no reason is given why it was not insurable. The defendant's point as to this is not sustained.

4. On the trial, defendant introduced witnesses who testified that they lived in the neighborhood of the Mathews home place; that it had been neglected for years prior to August 9, 1887, and no care taken of it, except to mow the meadow and lawn around the house; that the garden, nursery, and orchard had been permitted to grow up in weeds, some of which were two or three years old, and on the day of the fire were very dry; that the place was a resort for boys, who frequented it to swim in the pond, and, in the fall, to hunt; that the weeds and inflammable material at the southeast corner, near the nursery, ran right down to the defendant's right of way. At the conclusion of the evidence, defendant asked two instructions to the effect that the conduct of plaintiff in permitting these weeds to grow on his place, as above testified, constituted such contributory negligence as would prevent plaintiff's recovery, or, if such weeds augmented the loss, he could only recover for so much of the injury as would have followed, had he not been negligent in that regard. The circuit court declined to give either of said instructions, and defendant complains of that ruling. The instructions are predicated on the fact that the jury should first find that the fire was communicated by defendant's engine to this grass or weeds, but assumes that it was contributory negligence in plaintiff to permit these weeds to grow upon his land in this manner. This question has often been before this court, beginning with Fitch *v.* Railroad Co., 45 Mo. 322; and it has uniformly

been ruled that it was not contributory negligence in a farmer to permit dead and dried grass to remain in his fields adjoining the right of way, "especially," as was said in Patton *v.* Railway Co., 87 Mo. 117, "when there is no evidence that this is out of the usual course of husbandry." These decisions of this court are amply supported by both reason and authority in other States. In Railroad Co. *v.* Medley, 75 Va. 499, Judge Waller R. Staples delivered the opinion of the court. It appeared in that case that the plaintiff's land was covered with dry grass and broom sedge; that this grass was of a highly combustible nature, and easily ignited. The point was made that plaintiff was guilty of contributory negligence, but the court held otherwise, saying: "The legislature, in legalizing the use of engines running through the country, scattering fire and cinders on all sides over lands in the vicinity of the road, certainly did not intend to impose any additional burdens or duties upon the owners of such lands." "They are subject only to such risks as are necessarily incidental to the proper and legitimate operation of the road by those having charge of it." "Any other rule would impose upon property-holders near the line of a railroad the necessity of removing their grain, hay, and whatever is of a combustible nature, to some distant point,—not infrequently, of changing the whole course of husbandry, of incurring enormous expenses, and of exercising ceaseless vigilance,—in order that the company may negligently permit the accumulation of dangerously inflammable matter upon its own lands, liable at any moment to be ignited from its own locomotives." "It has been well said that fire is an extremely dangerous element, even when employed for a lawful purpose. The exercise of due care is imposed on him who uses it, and sets it in motion for his own advantage, and not upon him who is merely passive, confining himself to lawful employment and business in the conduct of his own affairs." "There are some few cases holding a contrary doctrine, but the great weight of authority is in conformity with the views here expressed. I refer particularly to an exhaustive discussion of the whole subject by Chief Justice Dixon in Kellogg *v.* Railroad Co., 26 Wis. 223; also, to a very able opinion of Judge Haymond in Snyder *v.* Railway Co., 11 W. Va. 14; Salmon *v.* Railway Co., 38 N. J. Law, 5, and 39 N. J. Law, 299." In Railroad Co. *v.* Schultz, 93 Pa. St. 341, the supreme court of Pennsylvania characterized the claim of defendant that plaintiff was guilty of contributory negligence because he permitted dry leaves, brushwood, and other rubbish on his property, which could be readily fired by sparks from its locomotive, as "an extraordinary proposition," assigning, among other reasons, that "it was an attempt to impose upon property-owners along the line of a railroad duties unknown and unnecessary before the building of the road," and, "if this proposition means anything, it means that upon such property-owners devolves the duty of guarding against the negligence of railroad companies and their servants, which is absurd;" and citing Judge Agnew's opinion in Railway Co. *v.* Hendrickson, 80 Pa. St. 182. See, also, Railroad Co. *v.* Jones, 86 Ind. 496; Vaughan *v.* Railroad Co., 3 Hurl. & N. 750; Railway

Co. *v.* Hixon, 79 Ind. 111. It will be observed that defendant's own witnesses testified to the mowing of the grass and meadow, and the only accumulation was in the nursery, garden, vineyard, and orchard. As remarked in Patton's case, *supra*, there was no evidence whatever that it was not customary, or even proper, at times, to let weeds grow. Certainly, it cannot be affirmed that weeds, even, are not often put to a most useful purpose, in
103 mulching and manuring. In any aspect of the case, we think there was nothing showing contributory negligence by the plaintiff. But there is another ground upon which this plea should have been denied, and that is, by virtue of section 2615, the defendant is made an insurer against fire set out by its engines; and it is a familiar rule that contributory negligence, short of fraud, does not furnish any defense to an action by the insured on his policy of insurance, and this was the view taken and enforced in Rowell *v.* Railroad Co., 57 N. H. 132.

5. In this connection, we are called upon to consider the position taken by defendant in the fourth paragraph of its answer, which is, in brief, that, at the time of the fire, plaintiff was insured in certain insurance companies to the amount of $10,000; that, after said fire, said companies paid said loss of $10,000. Wherefore, defendant prays that the insurance money so paid to plaintiff by said insurance companies shall be applied *pro tanto* to the damages sued for in this case. The defendant is most clearly not entitled to any benefit of the insurance money which accrued to plaintiff by reason of defendant's own act in destroying the insured property. In Dillon *v.* Hunt, 105 Mo., 154; 16 S. W., 516, division No. 2 of this court held the rule as stated in 1 Suth. Dam., 242, (ed. 1882,) to be correct, viz., "that there can be no abatement of damages on the principle of partial compensation received for the injury, when it comes from a collateral source, wholly independent of the defendant, and is, as to him, *res inter alios acta*. The payment of such moneys not being procured by the defendant, and they not having been paid or received to satisfy in whole or in part his liability, he can derive no benefit therefrom, in mitigation of damages for which he is liable. To permit a reduction on such a ground would be to allow a wrongdoer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." A similar conclusion had previously been reached in Carroll *v.* Railway Co., 88 Mo., 239, to which our attention was not called at the time. Although an insurer, defendant, having itself destroyed the property, has no right to share the immunity afforded other insurers. Their relation as to this loss is entirely antagonistic to it. The defendant's liability is first and principal; that of the insurance companies, secondary. Plaintiff and the insurance companies who paid his loss stand opposed to defendant, who was the cause of loss to both. There is no contractual relation or principle of subrogation that will enable defendant to require of them that they shall share their losses *pro tanto* with it. The statute points out the way by which it may protect itself against the loss. It confers on it an insurable interest in the property, and only by availing itself of this right can it guard

against those losses which occur by fires put out by it on the lands of adjoining owners. May, Ins., § 455; Harding *v.* Townshend, 43 Vt., 536; The Monticello *v.* Mollison, 17 How., 152; Hammond *v.* Schiff, (N. C.) 6 S. E., 753; Hart *v.* Railroad Co., 13 Metc. (Mass.) 105; Ross *v.* Railroad Co., 6 Allen, 90.

6. At the trial, defendant offered to prove that its right of way was a portion of the property described in plaintiff's petition; that when its railroad was built through plaintiff's premises, in 1882, condemnation proceedings were instituted against plaintiff, to which he was made a party; that before the commissioners appointed to assess plaintiff's among other items of damage caused by defendant's road, plaintiff claimed, as one, "damage of fire for all time to come." Defendant then offered to show by H. W. Hough and W. T. Essex, two of said commissioners, that they awarded plaintiff, for his damages to all his property, $9,000, and for this Home place they assessed the damage at $3,000; that in estimating the damage they took into consideration the danger to said property from accidental fire set out by engines on the railroad; that plaintiff and defendant finally agreed to abide the award, and the damages were accordingly paid. The court was requested to charge the jury, in the second instruction prayed by defendant and refused by the court, that if the commissioners did assess the damages, and in so doing took into consideration the danger to plaintiff's property by accidental fire, and said danger was also considered by plaintiff and defendant, then plaintiff cannot recover, provided such proceedings and compromise were had prior to March 31, 1887. When a part of a tract of land is taken for railroad purposes under condemnation proceedings, the jury or commissioners may properly take into consideration the risk from fire to the buildings, fences, timber, or crops upon the remainder, in so far and to the extent, only, that it depreciates the value of the property; but compensation for a probable or future loss by fire is entirely too speculative and remote to be made the basis of damages. As said in Railway Co. *v.* McGrew, 104 Mo. 282, loc. cit. 294, 15 S. W. 931: "It would not be proper to estimate the possible damage from fires or injuries to persons." "Neither may ever occur, and to take them into the estimate would be mere speculation." "We think they may properly be considered, however, in so far as they tend to depreciate the value of the whole property, and to affect the proposed changes, but no further." Lewis, Em. Dom. § 497; Mills, Em. Dom. §§ 163–166; Railroad Co. *v.* McComb, 60 Me. 290; Adden *v.* Railroad Co., 105 Mass. 199; Railway Co. *v.* McCloskey, 110 Pa. St. 436. The plaintiff's claim before the commissioners was damage from the risk of fire. In so far as that risk affected the value of his property not taken, by depreciating it, it was a proper claim. There was nothing to show that it was unjustly extended to an estimate of damages that might accrue at some future time, or might never occur. The damages assessed were $3,000, and paid. After the assessment, then, plaintiff held his property in its depreciated condition. How defendant can arrive at the conclusion that if this property, in its depreciated condition, is subsequently destroyed, plaintiff is not entitled to recover what-

ever damages shall accrue from such subsequent destruction, we cannot understand. The prior condemnation assessment has been made and settled. After that, plaintiff owns what is left, absolutely, as he owned the whole before a portion was appropriated by the road. The subsequent damages constitute no part of the first. It is not double damages, in any sense, as we view it. If the property is destroyed by negligence, there can be no question of the liability of the company for burning it, nor is it material, under section 2615, whether it was the result of negligence or pure accident. The statute operates upon the estate as it is when the fire occurs, and, as we hold the statute valid, the company is liable. Railroad Co. *v.* McComb, 60 Me. 290; Adden *v.* Railroad Co., 55 N. H. 413; Grissell *v.* Railroad Co., (Conn.) 9 Atl. 137; Pierce *v.* Railroad Co., 105 Mass. 199; Lyman *v.* Railroad Corp., 4 Cush. 288. We find no error in the judgment of the circuit court and accordingly affirm it.

Black, C. J., concurs in holding section 2615 constitutional, but not as a police regulation, and in all respects as to other points; Brace, Burgess, and Macfarlane, JJ., concur; Barclay, J., in the result; Sherwood, J., dissents.

JAS. B. GANTT, *Judge.*

104 And afterwards, to wit, on the 31st day of March, 1894, the following proceedings were had in said cause, viz:

LEONARD MATHEWS, Resp.,
v.
ST. L. & SAN. F. R'Y CO., App.

Comes now the said appellant, by attorney, and files its motion for a rehearing herein.

Which said motion for rehearing is in words and figures as follows, to wit:

STATE OF MISSOURI, *ss:*

In the Supreme Court, Sitting in Banc.

LEONARD MATHEWS, Respondent,
against
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Appellant.

Now comes the appellant and respectfully moves the court to grant it a rehearing in the above-entitled cause, and in support of said motion assigns the following reasons—that is to say:

1st. Because in the decision and opinion rendered in this case questions decisive of the case and duly submitted by counsel have been overlooked by the court.

2nd. Because said opinion and decision is in conflict with the Constitution of the United States in this, to wit: That by said decision and opinion the act of March 31, 1887, is held to be a valid enactment, when in truth and in law said act denies to defendant

the equal protection of the law, contrary to the provisions of
105 sect. 1, article 14, of the amendments to the Constitution of the United States, and in truth the said act deprives the defendant of its property without due process of law, contrary to the provisions of article 5 of the amendments to the Constitution of the United States, and in truth said act impairs the obligation of a contract made between the State of Missouri and the defendant, contrary to the provisions of article 1, sec. 10, of the Constitution of the United States.

E. D. KENNA &
L. F. PARKER,
Attorneys for Appellant.

And afterwards, to wit, on the 17th day of April, 1894, the following proceedings were had in said cause, viz:

LEONARD MATHEWS, Resp.,
v.
ST. L. & SAN F. R'Y CO., App.

Now, at this day, the court, having fully considered and understood the motion heretofore filed for a rehearing herein, doth order that said motion be, and the same is hereby, overruled.

And afterwards, on the same day, the further following proceedings were had in said cause, viz:

LEONARD MATHEWS, Respondent,
v.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Appellant.

106 Now, at this day, there is presented to the Hon. Francis M. Black, in chambers, a writ of error to the Supreme Court of the United States to reverse the judgment in the above cause and a supersedeas bond in the sum of twenty-five thousand dollars; which said writ of error is allowed and bond approved and ordered to be filed and made a part of the record herein.

Which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, The St. Louis and San Francisco Railway Company, as principal, and H. L. Morrill, M. M. Buck, and E. C. Simmons, as sureties, are held and firmly bound unto Leonard Mathews in the full and just sum of twenty-five thousand (25,000) dollars, to be paid to the said Leonard Mathews, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at the October term, A. D. 1893, of the supreme court of the State of Missouri, in a suit pending in said court between Leonard Mathews, plaintiff, respondent, and The St. Louis & San Francisco Railway Company, defendant, appellant, judgment

was rendered against the St. Louis & San Francisco Railway Company, and the said St. Louis & San Francisco Railway Company has obtained a writ of error from the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said
107 Leonard Mathews, citing and admonishing him to be and appear in the Supreme Court of the United States, at the city of Washington, District of Columbia, thirty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said St. Louis & San Francisco Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered by—

M. M. BUCK,
H. L. MORRILL &
E. C. SIMMONS, *As Sureties.*

In the presence of—

H. S. ABBOTT.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
By H. L. MORRILL,
Its Second Vice-President.

H. L. MORRILL. [SEAL.]
M. M. BUCK. [SEAL.]
E. C. SIMMONS. [SEAL.]

Approved by—

FRANCIS M. BLACK,
Chief Justice Supreme Court of Missouri.

And afterwards, on the 24th day of April, 1894, the further following proceedings were had in said cause, viz:

LEONARD MATHEWS, Respondent,
vs.
ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Appellant.

Now, at this day, there is presented to the Hon. Francis
108 M. Black, in chambers, a citation directed to the said respondent, citing and admonishing him to be and appear at a Supreme Court of the United States on the 16th day of May, 1894, and an assignment of errors; which said citation is signed and said assignment of errors ordered to be filed and made a part of the record herein.

Which said assignment of errors is in words and figures as follows, to wit:

In the Supreme Court of the United States.

LEONARD MATHEWS, Defendant in Error,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, Plaintiff in Error.

Assignment of Errors.

And now comes The St. Louis & San Francisco Railway Company, plaintiff in error in the above-entitled cause, and states that manifest error hath intervened to its prejudice in the proceedings had in said cause in the supreme court of the State of Missouri, and assigns as such error the following:

First. Said supreme court of the State of Missouri erred in holding as a valid enactment the following act, passed by the legislature of said State of Missouri March 31, 1887, said act being as follows:

"An act to establish the responsibility of railroad corporations, companies, and persons owning or operating railroads for damages by fire communicated by locomotive engines."

Be it enacted by the General Assembly of the State of Missouri as follows:

"SEC. 1. Each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person and corporation whose property may be injured or destroyed by
109 fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages.

SEC. 2. The term 'railroad corporation' contained in this act shall be deemed and taken to mean all corporations, companies and individuals now owning or operating, or which may hereafter own or operate any railroad in this State."

Approved March 31, 1887.

Because said act denies to the plaintiff in error the equal protection of the law, contrary to the provisions of sec. 1, art. 14, of the amendments to the Constitution of the United States.

Second. The said supreme court of the State of Missouri erred in holding said last-named act a valid enactment, because it deprives the plaintiff in error of its property without due process of law, contrary to the provisions of art. 5 of the amendments to the Constitution of the United States.

Third. Said supreme court of the State of Missouri erred in holding said last-named act — valid enactment, because it impairs the obligations of a contract made between the State of Missouri and the plaintiff in error, contrary to the provisions of art. 1, sec. 10, of the Constitution of the United States.

Fourth. Said supreme court of the State of Missouri erred in affirming the judgment against the plaintiff in error.

Fifth. Said supreme court of the State of Missouri erred in overruling the petition of the plaintiff in error for a rehearing in said case.

110 Wherefore said St. Louis & San Francisco Railway Company prays that the judgment of said supreme court of Missouri may be reversed.

E. D. KENNA,
Attorney for Plaintiff in Error.

STATE OF MISSOURI, *sct:*

I, John R. Green, clerk of the supreme court of the State of Missouri, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remain on file and of record in my office.

Seal of the Supreme Court of Missouri.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of Jefferson, this 1st day of May, 1894.

JNO. R. GREEN, *Clerk.*

Endorsed on cover: Case No. 15,588. Missouri supreme court. Term No., 105. The St. Louis & San Francisco Railway Company, plaintiff in error, *vs.* Leonard Mathews. Filed May 15th, 1894.

165-1

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK

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Supreme Court of the ~~United States.~~

OCTOBER TERM, 1896.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY,
Plaintiff in Error,
vs.
LEONARD MATTHEWS.

No. 105.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

L. F. PARKER,
Attorney for Plaintiff in Error.

PERCY WERNER and
GARLAND POLLARD,
Attorneys for Defendant in Error.

W. J. KESL, 317 OLIVE ST.

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY,
Plaintiff in Error,
vs.
LEONARD MATTHEWS.
No. 105.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

This was an action for damages for destruction of a house and other property of defendant in error by fire, alleged to have been communicated from a locomotive engine in use upon the railroad of the plaintiff in error, and was instituted in the Circuit Court of the City of St. Louis, Missouri. There was trial and judgment for the plaintiff below, defendant in error here, which upon appeal was affirmed by the Supreme Court of the State, and the case is here on a writ of error from that judgment.

The petition as originally filed contained two counts, the first of which was abandoned in the trial court; the second count, and the one on which verdict was rendered and judgment entered, is as follows:

"And for a second cause of action plaintiff says that during the month of August, 1887, plaintiff was the owner of a certain tract of land and improvements thereon situated in the County of St. Louis and the State of Missouri, the same being more fully described in the first count thereof. Defendant was the owner and operating the railroad adjoining said land on the south side, having locomotive engines in use upon said railroad, and on said 9th day of August, 1887, fire was communicated from a locomotive engine then in use upon said railroad owned and operated by defendant as aforesaid to plaintiff's property on his said land, and thereby a dwelling-house, barn, outbuildings, trees, shrubbery and personal property in and upon said land and the improvements thereon, and all being property of the plaintiff, were totally destroyed by said fire so communicated, to plaintiff's damage $30,000, for which he asks judgment, with costs."

The answer admits that defendant was a corporation and denies all other allegations of the petition, and set up the following special defences:

II.

And defendant, for another and further answer to the said second count of plaintiff's petition, avers that the plaintiff has assigned and transferred to persons to this defendant unknown his right of action against this defendant, if any he ever had, and is not a necessary or proper party plaintiff herein and is not the real party in interest, and is not therefore entitle- to maintain or prosecute the action.

II B.

And for another and further answer to said first count defendant says there is a defect of parties plaintiff in this, to-wit, that the Detroit Fire and Marine Insurance Company, the Commercial Union Assurance Company, and the Imperial Fire Insurance Company, and each and every one of them are parties in interest in this case, and are necessary parties plaintiff herein.

III.

Defendant, for further amended answer to the second count of plaintiff's petition herein, avers that on the date and at the time in said petition of plaintiff mendioned there *was* growing and standing upon the property in said petition described, adjacent to and continuous from the right of way of defendant company to the house, shrubbery, and trees of plaintiff in his petition described, large quantities of dry grass, leaves, weeds, and other combustible and highly inflam-able matter which were carelessly and negligently allowed to grow and accumulate upon the said premises in said petition described by and with the knowledge and consent of the plaintiff herein; that the accumulation of dry, combustible, and highly inflam-able matter as aforesaid had been carelessly and negligently allowed to remain upon said premises for a long time previous to the 9th day of August, 1887, to-wit, for many years; that it was gross negligence for plaintiff to so allow said dry and combustible matter to accumulate and remain upon his said premises without taking precautions to prevent the spread of fire which might accident-ly set out upon the right of way of defendant railway company or which might accident-ly excape from passing engines.

Wherefore defendant says that the plaintiff in this case was guilty of negligence, which it further avers did proximately and directly contribute to the injuries of which he complains.

IV.

And for further amended answer to second count of plaintiff's petition herein defendant avers the fact to be that the said dwelling-house, barn, and outbuildings in said petition described were on the 9th day of August, 1887, insured in the Detroit Fire and Marine Insurance Company, Commercial Union Assurance Company, and the Imperial Fire Insurance Company, doing buriness in the State of Missouri; that the said insurance was for the aggregate sum of $10,000, which defendant avers was greatly in excess of the real value of the said dwelling-house, barn, and outbuildings; that the said insurance companies, after the fire in plaintiff's petition alleged, paid to the said plaintiff the sum of $10,000 *of* account of the loss sustained by plaintiff by reason of the burning of said dwelling-house, barn, and outbuildings aforesaid.

Wherefore defendant says that the sum so paid to plaintiff by the insurance companies as aforesaid should be applied *pro tanto* to the satisfaction of plaintiff's claim, if any he has, which defendant denies.

V.

Defendant, for a further amended answer to the said second count, avers that the alleged cause of action therein set forth is founded upon an act of the legislature of the State of Missouri entitled "An act to establish the responsibilities of railroad corporations, companies and persons owning or operating railroads for damages by fire

communicated by locomotive engines," approved March 31, 1887, which act defendant avers is illegal, unconstitutional, and void, in that it seeks to deprive the defendant of its property without due process of law and contrary to the provisions of section 30, article 2, of the constitution of the State of Missouri.

VI.

Defendant, for a further amended answer to the said second count of plaintiff's petition herein, avers that the alleged cause of action therein set forth is founded upon an act of the legislature of the State of Missouri entitled "An act to establish the responsibilities of railroad corporations, companies, and persons owning or operating railroads for damage by fire communicated by locomotive engines," approved March 31st, 1887, which act defendant avers is illegal, unconstitutional, and void, in that it denies the defendant the equal protection of the laws, contrary to the provisions of Section 1, Article 14, of the amendments of the Constitution of the United States; and defendant further avers that said law was illegal, unconstitutional, and void in this, that it deprives defendant of its property without due process of law, contrary to the provisions of Article 5 of the amendment of the Constitution of the United States.

And defendant further avers that said law is illegal, unconstitutional, and void for the reason that it implies the obligations of a contract made between the State of Missouri and defendant, by the terms and provisions of which it was impliedly agreed that said defendant might and could use fire for the purpose of generating steam to propel said locomotive engines and cars attached thereto and be responsible only for the negligent and careless use thereof, and is contrary with provisions of Article 1, Section 10, of the Constitution of the United States.

VII.

That heretofore, to-wit: on the first day of June, A. D., 1882, the plaintiff was the owner of the land described in his petition and also of a certain strip of land along and adjacent to the west side of said tract 100 feet wide, being the same strip of land now occupied by defendant's road-bed and right of way, and that defendant was then desirous of building its road upon said strip. That plaintiff and defendant could not agree as to the amount of compensation to be paid to plaintiff for said strip, and defendant commenced proceedings in the Circuit Court of St. Louis County against plaintiff, the object and nature of which was to condemn a right of way upon said strip and through and along plaintiff's said land. That commissioners were duly appointed by said Circuit Court of St. Louis County before whom the matter of compensation of plaintiff was to be heard and before whom was then and there pending among other things the question of how much compensation plaintiff should receive from defendant.

First. For actual amount of ground taken.

Second. For the injury to the property as a place of residence caused by running the road where it now runs.

Third. For cutting up or dividing the property then owned by plaintiff into detached portions.

Fourth. For danger of fire for all time to come.

That thereafter, to-wit, on the 1st day of July, A. D. 1892, the said matters so pending before said commissioners were all compromised and settled between plaintiff and defendant upon the agreement that in consideration of all of said matters the defendant should pay plaintiff the sum of nine thousand dollars in full payment, settlement, accord and satisfaction of said right of way and said strip of land and all the matters and things so

pending before said commissioners as aforesaid. That thereafter, to-wit, on the 15th day of July, A. D. 1882, defendant for the consideration aforesaid paid to said Leonard Matthews, and said Leonard Matthews received from the defendant the said sum of nine thousand dollars pursuant to and in compliance with said contract and agreement. Wherefore defendant says the plaintiff ought not to prosecute or maintain said cause of action in said second count set out.

The Replication (p. 11)

Was a general denial of all new matter set up in the answer.

Plaintiff's Evidence.

The testimony tended to show that plaintiff was the owner of the property described in his petition. That the premises contained 11 or 12 acres of ground, and situated thereon before the fire was a residence, a barn and an outbuilding used for a water closet, and a large quantity of rare, beautiful and valuable shrubbery and trees. The place was occupied by plaintiff as a residence up to 1880, when he removed to St. Louis, leaving a man named Cleary in charge of the place. Cleary lived in the back part of the house and took care of the place till 1883, when it was rented to a Mr. Wright, who lived there until September, 1884, from which time until the fire the place was vacant except that some member of plaintiff's family would go out once in a while and sometimes stay all night and sometimes a week or two.

The evidence further tended to show that the house, outhouse, barn and contents and much of the shrubbery was destroyed by fire on August 9th, 1887, and that the fire was seen to start on defendant's right of way shortly

after engine No. 155 in charge of Engineer George Langenbacher and pulling a freight train known as "The Hoodlum" passed plaintiff's place going in an easterly direction. Testimony was also introduced tending to show that grass and weeds had accumulated on defendant's right of way along and adjacent to plaintiff's property and that the grass and weeds had been only partially cut, and what was cut was lying down.

Plaintiff testified that the house destroyed was worth $15,000 to $16,000. That the barn was worth $2,000 to $2,200. That the water closet was worth $75, and plaintiff's witnesses testified that the value of the shrubs, plants, trees and vines destroyed by the fire was worth from $6,000 to $7,000, and that the entire place was worth from $21,000 to $30,000 before the fire. It was shown that after the fire plaintiff sold the property for nine thousand dollars ($9,000).

When testimony was offered tending to show destruction of personal property contained in the buildings defendant objected because the same was incompetent, irrelevant and immaterial, and because the plaintiff was not entitled to recover for personal property destroyed, especially under the second count. These objections were overruled and exceptions duly saved by defendant (p. 23).

And on cross-examination of plaintiff while on the stand as a witness in his own behalf plaintiff testified that certain condemnation proceedings to which the parties in this action were both parties, were had when the St. Louis and San Francisco railroad was built through that property, and offered to prove by the witness that in those proceedings the commissioners assessed the damages to the property of the plaintiff at nine thousand dollars, and that the parties agreed to abide the decision of the commissioners, and the question of damages to the premises in question, by reason of accidental fire, which

might thereafter be set out by the engines of defendant was finally settled and compromised by the payment to him of the amount of that finding and that the settlement and compromise was based upon the action of those commissioners.

This testimony was objected to by plaintiff as immaterial and irrelevant, which objection was sustained and said testimony was excluded, and exceptions were duly saved by defendant, (Rec., p. 19); and defendant also offered to show in cross-examination of the plaintiff that the house and barn of plaintiff which *was* destroyed by fire *was* insured in the Detroit Fire and Marine Insurance Company, the Commercial Union Insurance Company, and the Imperial Fire Insurance Company for the aggregate sum of thir- thousand dollars, and that said insurance companies had paid the said sum in full to the plaintiff on account of said fire, and that said insurance was placed upon the plaintiff'- property prior to January 1st, 1887; to which plaintiff objected because the same was irrelevant and immaterial; which objections *were* by the court sustained and said evidence excluded; and defendant saved its exceptions. (Rec., p. 19.)

Defendant's Evidence.

The testimony introduced on behalf of the defendant tended to show that the train known as "The Hoodlum," was the only train which passed the property of plaintiff at or near the time of the fire, and was the only train which could have set out the fire, and that this train was pulled by engine No. 155, in charge of Engineer George Langenbacher. Defendant proved by Langenbacher that said engine was carefully inspected three days before the Matthews fire and that all its appliances to prevent the escape of fire were in good order.

Defendant proved by Langenbacher and by J. P. Eddy, round-house foreman, David Hughes, car inspector for the Union Depot Company; Samuel Hambly and Thomas McCord, each being a machinist and an expert, that on the morning after the Matthews fire they carefully examined engine No. 155 and that its cone netting and ash pan and all its appliances for preventing the escape of fire were of the most approved construction and in perfect order.

Defendant also introduced evidence tending to show that Patrick Dorsey, an employe of plaintiff, had been seen burning brush and weeds on plaintiff's place on the day of and prior to the fire.

Defendant also introduced evidence tending to show that the grass on its right of way all along the property of plaintiff had been closely mown and the cut grass and weeds removed between August 1st and 8th, 1887, and that on August 9th there was no inflammable material on said right of way.

Defendant introduced nine witnesses, each of whom lived in the neighborhood of the Matthews place, whose testimony tended to show that that place had been neglected for years prior to August 9th, 1887, and no care taken of it except to mow the meadow and lawn around the house; that the garden, vineyard, nursery and orchard (the portion of the tract adjacent to defendant's road) had been permitted to grow up in weeds, some of which were two or three years old and highly inflammable; that said place was a common resort for boys and loafers who frequented the place in the summer to swim in the pond and in the fall to hunt.

That it was vacant and open so any one could come and go at will and that these weeds and inflammable material at the southeast corner near the nursery ran right down to the right of way of defendant. It was also shown

that the fire was first seen on plaintiff's place on the south line near the southeast corner.

Defendant introduced as witnesses two architects, each of whom testified that a house like that of Mr. Matthews could be built for $8,500, and a barn like his could be built for $1,500, and gave in support of their testimony itemized estimates on which the same was based.

Defendant called seven witnesses, each of whom testified that he lived near the property of plaintiff known as his home place, and that he was familiar with the value of the property in that vicinity, and that his property was worth from $12,000 to $15,000 before the fire of August 9th, 1887.

Defendant introduced as witnesses H. W. Hough and Wm. T. Essex, two of the commissioners appointed by the court in 1882, in the condemnation proceedings, each of whom testified that he was familiar with the property described in the petition. That in 1882 before the railroad was built said property was worth $15,000; that it was damaged by the building of the road about $3,000, and that $12,000 was a fair valuation for it in August, 1890, before the fire, and defendant offered to prove by each of these witnesses:

1st. That in their report as commissioners they awarded to plaintiff the gross sum of nine thousand dollars as damages for all of his property.

2nd. That the sum of three thousand dollars was allowed as special damage to the home place, being the eleven acres and a fraction described in the petition in this case.

3rd. That in estimating the damage they took into consideration the danger to said property from accidental fire set out by engines which would be used on said railroad.

4th. That the parties to said proceedings agreed to abide the finding of said commissioners and finally settled in accordance with that report. To all of which plaintiff objected as immaterial and irrelevant, which objections were by the court sustained and said testimony excluded and defendant duly saved its exceptions (p. 32).

And defendant introduced as a witness, Howard Blossom, who testified that he was an insurance agent, and had been for many years. And defendant offered to prove by the witness that he was the agent of the Commercial Assurance Company of Detroit, The Fire and Marine Insurance Company and the Imperial Fire Insurance Company, and that each of said companies was carrying insurance on the house and barn of plaintiff which was destroyed by fire on August 1st, 1887, and that he had paid in cash to the plaintiff ten thousand dollars on account of the loss sustained by him on account of that fire being the same fire and loss named in the petition in this case. To which evidence plaintiff objected as immaterial and irrelevant, which objections were by the court sustained and said evidence excluded and exceptions were duly saved by defendant (p. 30).

Defendant also offered to prove by said witness that trees, shrubs, plants and vines were by their inherent nature not susceptible of insurance and that it is impracticable from a business stand-point to insure such classes of property and why it is so impracticable. To which evidence plaintiff objected as irrelevant and immaterial, which objections were by the court sustained, and said evidence was excluded, and exceptions duly saved by defendant (p. 31.)

Defendant introduced in evidence the petition in the condemnation proceeding of the St. Louis & San Francisco Railway Company against Leonard Matthews and others.

This petition describes among other property that described in the petition herein and seeks to condemn a right of way along the same.

And defendant introduced in evidence the following paper which had been identified by the plaintiff and also by witnesses Hough and Essex as the same paper that was either read or presented to the three commissioners in the right of way proceeding, by plaintiff, while they were acting as such.

Messrs. Henry W. Hough, Wm. T. Essex, Ephraim H. Obear, Commissioners:

GENTLEMEN—The St. Louis & San Francisco R. R. Co. and myself have agreed to refer to you the amount of damage I will sustain by running its road with a Y connecting with the Carondelet branch through my property at Oakland station.

In proceedings at law, I am entitled to all possible damage direct or indirect; present or remote; under all circumstances or contingencies that may arise or probably will accrue, and no benefits should any be possible can be credited to the account and if any doubts arise in your minds I should have the benefit thereof.

I claim the following for which I should be compensated:

1st. The actual amount of ground taken.

2d. By running the road through my property with the connection it will so injure the property as a place of residence as to render all my improvements practically worthless and they cost me over thirty thousand dollars.

3rd. The land will be so cut up as to render a very large portion of it practically worthless, and that which is left will be greatly deterioated in value. The land cost me in 1866 and 1868 forty-two thousand dollars; this was a time when property was greatly depressed; it has

been worth more than double since and would soon be very much more valuable than it is now, were it not for the railroad cutting it up as it will; as this will prevent me from realizing any benefit from the coming boom.

I will enumerate some of the damages that will be caused by the road as proposed, viz:

Danger of fire for all time to come.

Danger of teams running away.

Danger of crossing various tracks; there will be a 27½ foot cut south of my dwelling which will prevent anyone driving across the tracks from seeing or hearing the trains until quite on the tracks. This rendered the property unfit for residence and unsalable because anyone desiring a fine residence would not live where such dangers surround it. The heavy cuts on both the main road and branches as well as the heavy fills, divide the property so it cannot be used for pasturage or residence lots.

Annoyance from smoke and noise.

Loss of a large number of fruit trees and dividing my orchards so that those trees not destroyed will be useless by their isolation and exposure to thieves.

Loss of several hundred feet of fine hedge which cannot be replaced for years and without great cost.

Loss of about one thousand fine evergreens.

Cutting off the water supply for my pond, thus necessitating draining it because it will become stagnant and this would render it necessary to tear down my boat and ice house and leveling the dam.

Dissecting the property into a number of ugly-shaped pieces.

Ugly angles where the road and branches run through the property.

Great damage during construction by marauding laborers making my orchard useless and preventing my occupying, renting or selling the place for a long time.

Great number of tracks to be crossed.

Will run within one hundred feet of my house on west side of Holmes avenue, thus practically destroying its value.

The only dedicated streets through the property are Holmes and Schultze avenues.

From the above I claim my property is injured seventy-five per cent. of its value, and ask you to value it and allow me accordingly.

Respectfully,

LEONARD MATTHEWS.

For the purpose of showing that it was incorporated prior to March 31, 1887, defendant introduced in evidence its articles of incorporation, which show that it was incorporated September 10, 1876, under the general laws of the State of Missouri.

REBUTTAL.

The plaintiff offered evidence tending to show that the witness who testified to having seen Pat Dorsey burning brush and weeds on plaintiff's place on the day of the fire, could not see whether any one was burning brush on plaintiff's place.

This being all the evidence the defendant renewed its motion to compel plaintiff to elect between the counts in his petition, and the court sustained said motion and the plaintiff elected to stand on the second count of his petition.

The court thereupon gave the following instruction on behalf of the plaintiff, to each of which defendant objected and excepted at the time.

PLAINTIFF'S INSTRUCTION GIVEN (p. 56).

The court instructs the jury that if you believe from the evidence that during the month of August, 1887, plaintiff was the owner of the land in the petition described, and defendant was the owner or operating a railroad adjoining said land, having locomotive engines in use upon said road, and that on the 9th day of August, 1887, fire was communicated from a locomotive engine then in use upon the railroad owned or operated by defendant, to plaintiff's property on his said land, and thereby the buildings and other property in the petition mentioned or any of it were destroyed, then the jury will find for the plaintiff.

THE COURT'S INSTRUCTION (p. 56).

The court gave the following instructions of its own motion to which the defendant objected and excepted at the time:

The court instructs the jury that if they find for the plaintiff they will proceed to assess his damages at the reasonable value at the time and place of the fire of all such property of plaintiff mentioned in the petition as they shall from the evidence find to have been destroyed; in order to ascertain the value of the property destroyed by the fire you should take the value of the property as you may find the same from the evidence to have been immediately before the fire and the value thereof immediately after the fire and take the difference between the two valuations as the measure of damages.

The word value as used in these instructions means what it was reasonably worth in the market.

DEFENDANT'S INSTRUCTIONS GIVEN (p. 57).

And at the request of defendant the court gave the following instructions:

"1. The jury is instructed that it devolves upon the plaintiff to prove by a preponderance of evidence that the fire named in plaintiff's petition was communicated from a locomotive engine in use on defendant's road before he is entitled to recover.

2. The jury is instructed that the testimony of witnesses as to cost of individual buildings and of individual pieces of property will not be considered by them as furnishing a measure of damages but will be considered by them only so far as it tends to show what the property was worth at the time of the fire, and should they find for plaintiff they will not base their assessment of damages upon any fancy or speculative valuation of the property destroyed or any part thereof.

DEFENDANT'S INSTRUCTIONS REFUSED (p. 57).

And defendant prayed the court to give the following instructions, to-wit:

1st. If the jury believe from the evidence that upon the location of defendant's road through the premises described in plaintiff petition, the plaintiff and defendant could not agree upon the compensation to which plaintiff was entitled for damages for running its road through the same and that proceedings were instituted by the defendant to condemn a right of way through said premises and that commissioners were duly appointed to assess said damages, that said commissioners did assess said damages and that said cause and proceedings was compromised by defendant paying to plaintiff and plaintiff receiving from defendant the amount of such assessment, then plaintiff cannot recover provided such proceedings and compromise were had prior to March 31st, 1887.

2d. If the jury believe from the evidence that upon the location of defendant's road through the premises described in plaintiff's petition that plaintiff was entitled

for damages for running its road through the same and that proceedings were instituted by the defendant ot condemn a right of way through said premises and that commissioners were duly appointed to assess the said damages and that commissioners did assess said damages and that said cause and proceedings were compromised by defendant paying to plaintiff and plaintiff receiving from defendant the amount of such assessment and that in such assessment the danger to plaintiff property by accidental fire was taken into consideration by said commissioners and by plaintiff and defendant. then plaintiff cannot recover provided such proceeding and compromise was had prior to March 31st, 1887.

3rd. The jury is instructed that the liability of defendant upon the cause of action set forth in the second count of plaintiff petition is co-extensive with its right to insure the property destroyed and the defendant is not liable on said second count for the destruction of any property, which from its inherent nature was uninsurable.

4th. Though the jury may believe from the evidence that fire was communicated from a locomotive engine in use on defendant's railroad to plaintiff's property as charged in the second count of plaintiff's petition, yet the fact is only *prima facie* evidence of negligence on the part of defendant, and unless the jury believe from the whole evidence in the case that said fire was either negligently set out by defendant or was communicated to plaintiff property by reason of defendant's negligence the plaintiff cannot recover.

5th. Though the jury may believe from the evidence that fire was communicated from a locomotive engine in use on defendant's railway to plaintiff's property adjacent to defendant's right of way as was charged in the second count of plaintiff's petition yet the plaintiff is not entitled to recover anything on account of any personal property which may have been thereby destroyed.

6th. Though the jury may believe from the evidence that fire was communicated from a locomotive engine in use on defendant's railway to plaintiff's property adjacent to defendant's right of way as charged in the second count of plaintiff's petition yet the plaintiff is not entitled to recover anything on account of any trees or shrubbery which may have been thereby destroyed.

7th. Though the jury may believe from the evidence that fire was communicated from a locomotive engine in use on defendant's railway to plaintiff's property adjacent to defendant's right of way as charged in the second count of plaintiff's petition, yet if they further believe from the evidence that at the time of the fire named in plaintiff's petition there was growing upon the property in plaintiff's petition described adjacent to said right of way of defendant, dry grass, dry weeds, dry leaves, and other combustible and inflammable material and that such grass, weeds and other material had been negligently permitted to accumulate at said time and place to an unusual and unreasonable extent, and that such unusual and unreasonable accumulation did proximately or directly contribute to the injury complained of by plaintiff, then plaintiff cannot recover for such injury.

8th. Though the jury may believe that defendant is liable for the inception of the fire as that liability is defined in the other instructions yet if they further believe from the evidence that at the time of the fire named in plaintiff's petition, there was growing upon the property in plaintiff's petition described adjacent to said right of way of defendant, dry grass, dry leaves, dry weeds and other combustible and inflammable material, and that such grass, weeds and other material had been negligently permitted to accumulate at said time and place to an unusual and unreasonable extent, and that such unusual and unreasonable accumulation did proximately or directly augment the injury complained of by plaintiff,

then plaintiff can recover for only so much of said injury as would have followed, had he himself not been negligent in that regard.

9th. The jury are instructed that under the pleading and the evidence the plaintiff is not entitled to recover on the second count of his petition.

10th. The jury are instructed that, in case you find for the plaintiff in that case, the measure of his damage is the difference between the value of the premises immediately before and immediately after the fire. That the word value, as used in the above instruction, means what the property in question was worth in the market, and should they find for the plaintiff they will not base their assessment of damages upon any fancy or speculative valuation of the property destroyed or any part thereof.

All of which were by the court refused, to which ruling the defendant duly excepted.

There was a verdict and judgment for plaintiff for $11,000.

MOTION FOR NEW TRIAL (p. 61).

And within four days defendant filed its motion to set aside the verdict and for a new trial, assigning as reasons in support thereof the following:

1. Because said verdict is against the law and the evidence.

2. Because the court erred in not requiring plaintiff to elect before he went to trial.

3. Because the court erred in admitting any evidence under the petition over the objection of defendant.

4. Because the court erred in admitting illegal, incompetent and irrelevant evidence for the plaintiff over defendant's objection.

5. Because the court erred in excluding legal, competent and relevant evidence offered by defendant.

6. Because the court erred in refusing the instructions asked by defendant, in the nature of a demurrer to the evidence.

7. Because the court erred in refusing correct instructions asked by defendant.

8. Because the court erred in giving erroneous instructions on the part of plaintiff.

9. Because the court erred in not allowing the defendant to prove that plaintiff had received the sum of $10,000 insurance upon the property described in his petition.

10. Because the court erred in not allowing the defendant to prove that plaintiff had been compensated for all loss by accidental fire at the time defendant acquired a right of way through the land of plaintiff.

11. Because the court erred in holding that the law of March 31st, 1887, was a valid enactment.

12. Because the act of March 31st, 1887, denies to the defendant the equal protection of the law, contrary to the provisions of Section 1, Article 14, of the amendments of the Constitution of the United States; deprives defendant of its property without due process of law, contrary to the provisions of Article 5, of the amendments to the Constitution of the United States; and impairs the obligations of a contract made between the State of Missouri and defendant, contrary to the provisions of Article 1, Section 10, of the Constitution of the United States.

13. Because the act of March 31st, 1887, was contrary to the provisions of Section 53, Article 4, of the constitution of Missouri.

14. Because the court erred in refusing the instruction asked by defendant, based upon the contributory negligence of plaintiff.

15. Because the defendant was denied the equal protection of the law, in this, that unlike other persons it

was not permitted to avail itself of plaintiff's contributory negligence as a defense herein.

16. Because on the whole record the verdict was for the wrong party.

Which motion for a new trial was by the court overruled and exception duly saved by defendant.

MOTION IN ARREST OF JUDGMENT.

Within four days from the rendition of judgment defendant filed its motion in arrest, assigning as reasons in support thereof the following:—

1. Because the record will not support the judgment.

2. Because plaintiff's petition fails to state facts sufficient to constitute a cause of action.

3. Because the second count of plaintiff's petition being the count on which recovery was had states no cause of action.

4. Because the court erred in holding that the act of the legislature of Missouri entitled "An Act to establish the responsibility of railroad corporations, companies, and persons owning or operating railroads for damages by fire communicated by locomotive engines," approved March 31st, 1887, was not in violation of Section 30, Article 2d, of the constitution of the State of Missouri.

5. Because the court erred in holding that said act last named was not in violation of Section 1, Article 14th, of the amendments to the Constitution of the United States.

6. Because the court erred in holding that said act last above named was not in violation of Article 5 to the amendments of the Constitution of the United States.

7. And because the court erred in holding that said act was not in violation of Article 1, of Section 10, of the Constitution of the United States.

This motion was by the court overruled and defendant excepted, and in due time defendant perfected its

appeal to the Supreme Court of the State of Missouri, in which court the judgment of the court below was affirmed and the defendant in the court below brings the case here by writ of error.

Specification of Error.

I.

The Circuit Court erred in refusing to permit the plaintiff in error to show that in the condemnation proceedings the damage to the property of plaintiff by reason of its increased liability to accidental fire, owing to its proximity to a line of railway upon which locomotive engines were to be propelled by steam, was taken into consideration by both parties and by the commissioners, and that defendant in error had received full compensation therefor. (Rec., p. 19.)

II.

The Circuit Court erred in refusing to permit plaintiff in error to show that the property destroyed had been insured by defendant in error and that he had collected as insurance thereon the sum of ten thousand dollars. (Rec., p. 19.)

III.

The Circuit Court erred in giving the instruction asked by plaintiff in the court below. (Rec., p. 39.)

IV.

The Circuit Court erred in refusing the first instruction asked by defendant in the court below. (Rec., p. 40.)

V.

The Circuit Court erred in refusing the second instruction asked by defendant in the court below. (Rec., p. 40.)

VI.

The Circuit Court erred in refusing Instruction No. 3, asked by defendant in the court below. (Rec., p. 40).

VII.

The Circuit Court erred in refusing Instruction No. 4 asked by defendant in the court below. (Rec., p. 40).

VIII.

The Circuit Court erred in refusing Instruction No. 5, asked by defendant in the court below. (Rec., p. 41).

IX.

The Circuit Court erred in refusing Instruction No. 6, asked by defendant in the court below. (Rec., p. 41).

X.

The Circuit Court erred in refusing Instruction No. 7, asked by defendant in the court below. (Rec., p. 41).

XI.

The Circuit Court erred in refusing Instruction No. 8, asked by defendant in the court below. (Rec., p. 41).

XII.

The Circuit Court erred in refusing to instruct the jury upon request of defendant in the court below, that "under the pleadings and the evidence the plaintiff was (is) not entitled to recover on the second count in his petition."

XIII.

Because the Supreme Court of Missouri erred in ~~holding that the Supreme Court of the State of Missouri erred in~~ holding as a valid enactment the following act, passed by the legislature of said State of Missouri, March 31, 1887, said act being as follows:

"An act to establish the responsibility of railroad corporations, companies, and persons owning or operating railroads for damages by fire communicated by locomotive engines."

Be it enacted by the General Assembly of the State of Missouri as follows:

"SECTION 1. Each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages.

SEC. 2. The term 'railroad corporation' contained in this act shall be deemed and taken to mean all corpo-

V.

The Circuit Court erred in refusing the second instruction asked by defendant in the court below. (Rec., p. 40.)

VI.

The Circuit Court erred in refusing Instruction No. 3, asked by defendant in the court below. (Rec., p. 40).

VII.

The Circuit Court erred in refusing Instruction No. 4 asked by defendant in the court below. (Rec., p. 40).

VIII.

The Circuit Court erred in refusing Instruction No. 5, asked by defendant in the court below. (Rec., p. 41).

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SEC. 2. The term 'railroad corporation' contained in this act shall be deemed and taken to mean all corpo-

rations, companies and individuals now owning or operating, or which may hereafter own or operate any railroad in this State."

Because said act denies to the plaintiff in error the equal protection of the law, contrary to the provisions of Sec. 1, Art. 14, of the amendments to the Constitution of the United States.

XIV.

The said Supreme Court of the State of Missour erred in holding said last-named act a valid enactment, because it deprives the plaintiff in error of its property without due process of law, contrary to the provisions of Art. 5 of the amendments to the Constitution of the United States.

XV.

Said Supreme Court of the State of Missouri erred in holding said last-named act a valid enactment, because it impairs the obligation of a contract made between the State of Missouri and the plaintiff in error, contrary to the provisions of Art. I, Sec. 10, of the Constitution of the United States.

XVI.

Said Supreme Court of the State of Missouri erred in affirming the judgment against the plaintiff in error.

POINTS.

Defendant for a reversal, relies upon the following points:—

First. Section 2615 of the Revised Statutes of 1889 is unconstitutional, because;—

(a) It impairs the obligation of the contract contained in defendant's charter.

Sec. 2543, R. S. 1889:

Fletcher vs. Peck, 6 Cranch, 87.

Dartmouth College vs. Woodward, 4 Wheat., 518.

U. S. vs. Quincy, 4 Wall., 535.

Greene vs. Biddle, 8 Wheat., 92.

Planters Bank vs. Sharp, 6 How., 327.

Commissioners vs. Transp. Co., 107 Pa. St., 112.

Ry. Company vs. Ry. Company, 60 Md., 263.

Bank vs. Hamilton, 21 Ill., 53.

Payne vs. Baldwin, 3 S. & M., 661.

Edwards vs. Kearsey. 96 U. S., 607.

Howard vs. Bugbin, 24 How., 461.

Meriwether vs. Garrett, 102 U. S., 472.

Bronson vs. Kinzey, 1 How., 311.

McCracken vs. Hayward, 2 How., 608.

Louisiana vs. N. O., 202 U. S., 203.

Gas Co. vs. Gas Co., 115 U. S., 668.

Water Works Co. vs. Rivers, 115 U. S., 82.

People vs. Jackson Road Co., 9 Mich., 285.

Sloan vs. Pacific Railroad Co., 61 Mo., 24.

Smith vs. Railroad, 37 Mo., 295.

Wharton on Negligence, Sec. 668.

Burroughs vs. Railroad, 15 Conn. 128.

Mosher vs. Railroad Company, 8 Barb., 477.

Rood vs. Railroad Company, 18 Barb., 37.

Bank vs. Knoop, 16 How., 369.

Dodge vs. Wheeler, 18 How., 331.

Thomas vs. Railroad Company, 101 U. S., 71.

Ry. Co. vs. Riche, Law Reports, 7 H. L., 653.

Bull vs. Ry. Co., 5 Harr. (Del.), 401.

Lake View vs. Rose Hill Cemetery, 70 Ill., 196.

Railroad vs. Lackey, 78 Ill., 57.

Thorp vs. Railroad, 27 Vt., 143.

Bronson vs. Meyer, 10 Barb., 223.

Small vs. Railroad, 51 Iowa, 346.

Cooley Const. Lim., 5 Ed., 337.

Trustees vs. Indiana, 14 How., 268.

Scotland County vs. Railroad, 65 Mo., 135.

State *ex rel.* Haussler vs. Greer, 78 Mo., 188.

(b) It denies defendant the equal protection of the laws.

Pierson vs. Portland, 69 Me., 269.

State vs. Hays, 81 Mo., 586.

Railway Company vs. Moss., 60 Miss., 641.

Slaughter House Cases, 16 Wall., 336.

Railroad Tax Case, 13 F. R., 722.

Santa Clara County vs. Railroad, 118 U. S., 394.

(c) It takes defendant's property without due process of law.

Railroad Company vs. Lackey, 78 Ill., 57.

Small vs. Railroad, 51 Ia., 340.

Zeigler vs. Railroad, 58 Ala., 594.

Miller vs. Martin, 16 Mo., 508.

Khale vs. Hobin, 30 Mo. App., 476.

Catron vs. Nichols, 81 Mo., 82.

Wally's Heirs, 2 Yerg., 554.

Second. Said section, if valid, only makes the fact of the injury *prima facie* evidence of negligence.

Small vs. Railroad, *supra.*

Dill vs. Railroad, 32 A. & E. R. R. C., 324.

Khale vs. Hobin, *supra.*

Catron vs. Nichols, *supra.*

Third. Said section does not authorize damages for property upon which plaintiff could not have obtained insurance.

Chapman vs. Railroad, 37 Me., 92.

Fourth. Plaintiff was not entitled to damages for his personal property.

Chapman vs. Railroad, *supra.*

Fifth. The question of plaintiff's contributory negligence should have been submitted to the jury.

Ross vs. Railroad Company, 6 Allen, 92.

Sixth. Plaintiff was compensated for his loss in the condemnation proceedings instituted by the defendant.

Small vs. Railroad Company, *supra.*

Seventh. The defendant should have been allowed to prove the amount of insurance which plaintiff had upon his buildings at the time they were destroyed.

ARGUMENT.

I.

Is Section 2615 of the Revised Statutes of 1889 a valid enactment?

In this case the plaintiff chose to make one fire and one injury the subject of two counts in his petition. In the first count the defendant is charged with negligence in the operation of its trains and the maintenance of its way and damages were asked because of its liability at common law. In the second count there is no averment of negligence and for a recovery plaintiff relies solely upon the statute.

At the trial and after all the evidence had been introduced, plaintiff under the court's ruling elected to stand on the second count of his petition and the jury were instructed accordingly. It is unnecessary to set forth the instructions given and refused, for so far as the question now under consideration is concerned, it will be sufficient to state that the jury were directed to find for the plaintiff, if they believed that his property had been destroyed by fire communicated directly or indirectly by locomotive engines in use upon defendant's railroad. There was no necessity for any proof of negligence under the court's construction of the statute. The defendant was not only held absolutely liable as an insurer of plaintiff's property, but the gross contributory negligence of plaintiff, testified to by nine different witnesses, was withdrawn from the jury, and their verdict for $11,000 rests solely upon proof tending to show, *First*, that a locomotive engine was seen to pass the plaintiff's premises shortly before the fire was

discovered, and, *Second*, that the fire in question destroyed the plaintiff's house, buildings, shrubbery and trees.

The statute in question was enacted in 1887 (Laws of 1887, p. 101) is incorporated in the revision of 1889, and reads as follows:

Section 2615. FIRES FROM ENGINES—DAMAGES.—Each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages.

We assert that the law in question as construed by the able judge who tried this case, is unconstitutional, because:

(A) It impairs the obligation of a contract.

(B) It deprives defendant of its property without due process of law.

(C) It denies to defendant the equal protection of the laws.

A.

Impairment of Contract.

The defendant is a railroad corporation organized under the general laws of this State, from which it received all of its powers and to whose proper legislative control in those matters which affect the public, it yields obedience, and to whose courts it looks for protection when the legislature passing beyond constitutional limits attempts to appropriate its property and without reason or justice give the same to another.

It would seem from some of the authorities that the operation of a railroad is in itself an unlawful act. Quite the contrary is true. But for that recognition which the law gives, and in the absence of express grant it would be impracticable to construct or operate a railroad. Doubtless it may appear a mere waste of words to give expression to such truths but as we will hereafter see there is a necessity for it because able jurists have deliberately treated the operation of a railroad as an act similar in all respects to the keeping and confining on one's premises of dangerous and ferocious animals, and the doing of other unnecessary if not unlawful acts.

A corporation organized under general laws must look for its powers and the terms of its contract to the statutes in force at the time of its organization and of course to such constitutional provisions as had been or might thereafter be lawfully adopted. And such statutes and constitution must be read in the light of that judicial interpretation which had been previously placed upon them.

When looking for the powers possessed by this defendant we turn naturally to that section of the general law which sets forth the powers granted to corporations organized under the laws of Missouri and which laws have remained substantially unchanged for twenty years. In such section (§ 2543 Rev. Stat. Mo. 1889) we find the following:

Sixth. To take and convey persons and property on their railroad by the power or force of steam or of animals or by any mechanical power and to receive compensation therefor.

This sub-division contains two of the most important franchises granted defendant, to wit: The right to use steam and the right to receive compensation for services to be performed.

The franchise to receive compensation was one which was subject to future amendment and control but the franchise to use steam was granted absolutely without any reserved right whatever in the State, except such, of course, as inhered in it by reason of its police powers, and § 2615 as we will hereafter show cannot under any pretense or construction be considered for a moment as a police regulation.

It should also be kept in mind that not only was the defendant authorized to use steam but under the terms of its contract with the State, it became obligated to do so, for the franchises which it received, including the right to exist, would never have been granted but for the anxiety of the State to obtain rapid and cheap transportation for the benefit of its citizens.

Charters of a corporation are contracts between the legislature and the corporators having for their consideration the liabilities and duties which the corporators assume by accepting them.

It would seem needless to argue on behalf of principles so well established in our jurisprudence but as the legislature seems to have lost sight of them and as able and distinguished courts have in cases of this character passed them by without consideration, we feel warranted in referring to that line of decisions which, beginning with Fletcher vs. Peck and Darthmouth College vs. Woodward, and succeeded by decisions of equal strength and vigor, have given to the property interests of this country a cable of security which can never be broken save by violence.

The doctrine is well stated by Cooley in his work on Constitutional Limitations, where he says (page 279):—

"Those charters of incorporation which are granted for the private benefit or purposes of the corporators are held to be contracts between the legislature and the corporators, having for their consideration the liabilities and

duties which the corporators assume by accepting them and the grant of the frahchise can no more be resumed by the legislature or its benefits diminished or impaired, without the consent of the grantees, than any other grant of property or valuable thing, *unless the right to do so is reserved in the charter itself.*"

In support of Judge Cooley's statement of the law, he cites many cases, but one alone would have been sufficient—*the Dartmouth College case*—for in no particular has the effect of Chief Justice Marshall's opinion in that case been changed by subsequent decisions.

In Fletcher vs. Peck, 6 Cranch, 87, it was held that the State could not impair the obligation of its contract, any more than could an individual.

In the *Dartmouth College case* as every one knows the great principle announced was that any act of the legislature that takes away any of the powers or franchises vested by its charter in a private corporation or which restrains or controls the legitimate exercise thereof, or transfers them to another person, without its assent, is a violation of the obligations of that charter and is unconstitutional and void.

In United States vs. Quincy, 4 Wall., 535, the court said:—

"*It is also settled that the laws which subsist at the time and place of making of the contract* and where it is to be performed, *enter into and become a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces* alike those which affect its validity, construction, discharge and *enforcement.*"

It was the intention of the parties to the contract made between the State and defendant, that it should be "enforced" through the use of steam.

It cannot be said that the law in question does not interfere with the defendant's use of steam but is simply a reasonable regulation. *Any regulation which impairs is*

wrongful unless the right to regulate exists by virtue of some law or provision of the statute in force at the time the right impaired was granted.

In Green vs. Biddel, 8 Wheat, 92, the court said:—

"It is no answer that the acts of Kentucky now in question are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of existing remedies as to materially impair the rights and interests of the owner, they are just as much a violation of the compact, as if they overturned his rights and interests. * * * Objection to a law on the ground of its impairing the obligations of a contract does not depend upon the extent of the change whichthe law effects in it. Any deviation from its terms imposing conditions not expressed in the contract or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligations."

"The prohibition has no reference to the degree of impairment. (United States vs. Quincy, *supra.*)

In Planters Bank vs. Sharp, 6 How. 327, it was said:

"One of the tests that a contract has been impaired is that its value has by legislation been diminished. *It is not by the constitution to be impaired at all. This is not a question of degree or cause but of encroaching in any respect on its obligations and dispensing with any part of its force.*"

Nor can it be said that section 2615 only slightly impairs the obligation of the contracts between the State and its railroad corporations, for any company operating in the city of St. Louis may, accidently, set out a fire which would cause damages greater in amount than the entire value of the corporate property. It must be remembered that the statute in question does not limit the damages to fires occurring immediately upon a line of railroad

but includes all damages directly or indirectly attributable to the fire set out by locomotives. Similar acts are so construed by those courts which uphold them.

A corporation is protected by the constitution in the use and enjoyment of all such rights and powers as are granted by its charter, and any subsequent legislation which takes away those rights or curtails them is invalid.

Bank vs. Sharp, *supra*

Commissioners vs. Transp. Co., 107 Pa. St., 112.

Railway Company vs. Railway Company, 60 Md., 263.

"And the same is true of those rights and powers which are incidental to the company's business and proper and necessary to carry into effect the powers granted."

Bank vs. Hamilton, 21 Ill., 53.

Payne vs. Baldwin, 3 S. & M., 661.

It has been repeatedly announced by the courts of this country that the remedy subsisting in the State when and where the contract is made and is to be performed, is part of its obligation and any subsequent law of the State which so affects the remedy as to substantially impair and lessen the value of the contract is forbidden by the constitution and is therefore void.

Edwards vs. Kearsey, 96 U. S., 607.

Howard vs. Bugbin, 24 How., 461.

Meriwether vs. Garrett, 102 U. S., 472.

Bronson vs. Kinzey, 1 How., 311.

McCracken vs. Hayward, 2 How., 608.

La. vs. N. O., 102 U. S., 203.

Gas Co. vs. Gas Co,, 115 U. S., 668.

Water Works Co. vs. Rivers, 115 U. S., 82.

People vs. Jackson Road Co., 9 Mich., 285.

Can it be said that the remedy to enforce a contract must be respected but the manner of its performance may be ignored?

The decisions of the Supreme Court of Missouri are in perfect harmony with those of the Federal Courts.

In Sloan vs. Pacific Railroad Company, 61 Mo., 24, the facts were briefly these:

The Pacific Railroad in its original charter was given the exclusive right to fix tolls. Subsequently it accepted an amended charter in which it was provided that after ten years the company should be subject to general laws regulating rates. Before the ten years had elapsed the legislature passed a general law having for its effect the controlling of rates and providing for a penalty. Sloan brought suit against the railroad company to recover the penalty and a judgment was rendered in its favor in the court below. This judgment was affirmed and the court said:

"We hardly think it necessary to revert to the Dartmouth College case to justify the assertion that private corporations, although established for public uses, are still entitled to such rights as the legislature creating them has bestowed in their charter or acts of creation."

A contract must be interpreted in the light of all the facts and laws which existed at the time of its acceptance, and in order for this court to determine the full force of

that provision which gave defendant the right to use steam, it is necessary that all the laws in force at the time defendant was incorporated, should be considered and the manner in which steam might be then lawfully used must be held to be the manner in which it could be used at the time plaintiff's injury arose.

It is a uniform rule that every contract is made with a view to the existing laws which become a part of it and by the aid of which it is to be read and expounded. (Miller's Constitutional Law, 531.)

There was no statute on the subject in force at the time defendant was organized, but the decisions of the State Supreme Court had established the law to be that railroad companies could not be held liable for injuries from fire in the absence of proof or at least a presumption that the company had been guilty of negligence in the operation of its trains, the construction of its engines or the care of its right of way. In other words the common law was in force and the common law had been declared in the case of Smith vs. Railroad, 37 Mo., 295, where the court said:

"The rule is well stated in Wharton on Negligence, "Section 668, where the author says: 'The legislature " 'says this is an essential industry. *You are authorized* " *'to engage in it, and it is necessary that your engines* " *'should be driven by fire and steam; you are are author-* " *'ized to use fire and steam in your engines.'* "

In Burroughs vs. Railroad, 15 Conn., 128, the court said:

"All they have done then must be lawful if the legislature could make it so. Where then is the wrong? * * * In what respect does it differ from a similar injury by a spark from a dwelling house? In either case the spark proceeds from a reasonable use of one's own property. * * * If there be no fault in the one case how can there be in the other?"

It is necessary for this court to pass upon the manner in which the defendant was authorized to use steam as it is competent for it to determine whether the right to do so exists. And that which was lawful at the time the contract was executed cannot be made unlawful by subsequent legislation, for the franchise to use steam is a right which cannot be impaired, not a mere permission or license, revocable at the will of the grantor. That it was fairly intended and agreed that the railroad company could rightfully use steam without suffering in consequence of the legitimate, careful and prudent operation of its trains and railroad, is an irresistible conclusion. For the State to say you may use steam, meant you may use it subject to the common law as construed by the courts of the State, and this is quite a different thing from saying, as the State undoubtedly could have said, but it did not elect to, you may use steam but you will be responsible for all damages suffered by the public in consequence thereof.

If this enactment is to be held valid, there is no limit to the liabilities which may be imposed upon corporations. They may be held responsible for every individual injured or killed by its trains, and that too without reference to the contributory negligence of the persons injured or killed. Still further, railroad companies could be held liable, not only for all persons and property injured or destroyed, but for all injuries resulting directly or indirectly from the operation of its trains. All property injured in consequence of the emission of smoke and cinders, or because of the noise and confusion attending the movement of trains would become the subject of litigation, and so on without limit, could the liabilities of railroad companies be extended until their existence would terminate in bankruptcy.

In passing upon this law the court must look to the logical sequence of its sanction, consider the result which

will attend its decision and the warrant there would be for the passage of all kinds of confiscatory laws, should this one be sustained.

In Letters of Publius (Federalist, 144) Mr. Madison said: "They (referring to the people) have seen too, that one legislative interference is but the link of a long chain of repetitions, every subsequent interference being produced by the effect of the preceding."

And it was in consequence of such legislative interference that the provisions now invoked were inserted in our constitution. We reiterate, the decisions in force at the time defendant was chartered authorized railroad companies, to use steam without—in the absence of negligence—being responsible for damages, and these decisions entered into and formed a part of the contract as much as if they had been expressly inserted. (Van Hoffman vs. Quincy, *supra.*)

And we insist that the intention of the State and the company with regard to the *manner* in which steam could be used being clearly ascertained from an examination of the general laws and decisions of the State in force when defendant was organized, the law in question is invalid, because it diminishes the value of the franchise, and that being true the question of degree cannot be entertained at all, for no encroachment is permissible. (Edwards vs. Kearzey, *supra.*)

In Mosher vs. Railroad Company, 8 Barb., 477, it was held that the authority to use steam engines impliedly gave the authority to make a noise.

In Rood vs. Railroad Company, 18 Barb., 37, it was held that the authority to use a steam engine carried with it the authority to emit sparks.

"Speaking generally, it may be said that every valuable privilege conferred upon incorporators which conduces to the acceptance of a charter and organization thereunder, constitutes a contract."

Bank vs. Knoop, 16 How., 369.

Dodge vs. Wheeler, 18 How., 331.

And that which is clearly implied in the charter is as much included in the powers as that expressly granted.

Thomas vs. Railroad Co., 101 U. S., 71.

That a charter granted under the general laws is as immutable as a charter granted by special act, is the law everywhere.

Ry. Co. vs. Riche, Law Reports, 7 H. L., 653.

In Bull vs. Ry. Co., 4 Harr. (Del.), 401, defendant was given the right to bridge a stream. Afterwards an act was passed giving certain property owners the right to recover damages against the defendant for putting up an obstruction. It was held that the act was void because the power to build having been given, the right to recover, subsequently conferred, imposed a burden and was a violation of the contract.

In Lake View vs. Rose Hill Cemetery, 70 Ill., 196, the defendant was given the right to acquire fifty acres of ground for the purpose of a cemetery. It inclosed a portion of the land and so used it. As it was about to inclose the remainder an act was passed prohibiting the use of the outside land for the purposes authorized in the charter. The court said; "There is nothing in nature but may be the instrument of mischief and the burial of the dead may be so done as to be most injurious in its consequences to the people in the vicinage. But that is not the question in the case at bar. By this act of the General Assembly it was intended to prohibit absolutely the use of the grounds by the company for burial purposes. *The act of granting the charter was itself a legislative construction that a cemetery is not necessarily a nuisance, if the grounds are well*

selected and interments made with proper care. That it might become so through misconduct no one doubts. The General Assembly has the right to pass laws to regulate interments, to prevent injury to the health of the community and, notwithstanding the company in this instance is exercising franchises conferred by the State, it is within legislative control in this regard. The State cannot, under the pretense of making police regulations, repeal its charter and revoke its franchises or deprive the company of any of the essential rights conferred by its charter. The act of the legislature does not profess to correct any abuses in the use of the property, but is an arbitrary prohibition of its use in accordance with the provisions of a charter previously granted."

Commissioner vs. Erie Trans. Co., 107 Pa. St., 115, was a case where the corporation had by charter the unconditional privilege of increasing its stock from time to time. An act of the legislature passed afterwards required all corporations to pay a certain bonus upon increase of stock. *Held*, to be an impairment of the contract as an additional burden upon the exercise of one of the rights, granted in the charter.

Some years since the State of Illinois passed a law making railroad companies absolutely liable for all expenses attending the burial of persons killed upon their cars or by their engines or trains.

Suit was brought for the purpose of compelling the railroad company to pay the expense attending the burial of three persons who were killed through no fault or negligence of the railroad company. The Supreme Court of Illinois held the law in question to be unconstitutional. (Railroad vs. Lackey, 78 Ill., 57).

The court in that case said:—"It may very pertinently be asked, why this distinction? On what principle is it that railroad corporations without any fault on their part shall be compelled to pay charges which in other

cases are born by the property of the deceased. * * * the running of trains is lawful and of great public benefit. * * * There is neither reason nor justice in it."

The State of Missouri invited the investment of the capital employed by the defendant corporation. That capital was invested for the benefit of the State as well as for the benefit of the stockholders. The latter knew that in certain matters which affect the public, such as the making of rates, they would be subject to reasonable regulations. They knew, likewise, that when the health, morals, property or life of the public was in danger, compliance with reasonable police regulations could and would be enforced. They likewise knew, or thought they knew, that those provisions of the charter which secured to them individual rights, in the use of their franchises, must be regarded. The right to use steam being expressly granted, the manner in which steam could be lawfully used having been absolutely determined by the courts, such rights could not be impared by any subsequent legislation, unless some authority therefor was reserved to the State, and we pass therefore to the consideration of what power to regulate or control the defendant, remained in the State after its grant had been executed.

Enactments affecting the property rights of a corporation are legal only when,

(a) The property of the corporation is affected by a public interest and the law relates to a duty due the public;

(b) When the regulation is reasonable police law;

(c) When the right to amend the charter is expressly reserved.

(a) That a railroad company's property is clothed with a public interest we can here admit; that all property of this character is acquired with the understanding that the government retains the right and may, within reason-

able bounds, in certain cases elect to control, the property, in such matters as concern the public, need not be denied. But who will affirm that under this reserved right to control, the gavernment may take something out of one person's pocket and place it into the purse of another in satisfaction of a private grievance and concerning a matter of no public interest? Governmental control is a term which though often misunderstood, is yet well defined by the decisions of our courts. The right to control is exactly the same in the case of a corporation as in case of an individual. It is not because of the subject whose property is affected, for it makes no difference whether it be an artificial or a natural person. The right to control those whose property is affected with a public interest in the matter of rates and in the manner in which they shall serve the public, was established by a decision in a case where the defendant was an individual. We refer to Munn vs. Illinois, 94 Ill., 113. This court will recall that the decision in that case was based on the fact that the elevator owned by the defendant being used in a manner to make it a public servant, became clothed with a public interest, and affecting the community at large, the defendant must have known when he devoted his property to such use that he was granting to the public an interest in that use and must submit to be controlled by the public for the common good.

But the public can control the property of a corporation or of an individual for the reasons announced in the Munn case only when the purpose sought to be accomplished is something which affects the public.

In the above case the Supreme Court said (quoting Thorp vs. Railroad, 27 Vt., 143), "This does not confer power upon the whole people, to control rights which are purely and exclusively private."

Plaintiff's injury and defendant's right to use steam concern only private rights. In fact it can be safely

stated we think that no case can be found giving to an individual a remedy in case of a personal injury or for property lost, which is based upon a law that has been sustained in consequence of this general right of control. Such cases and the statutes which authorize them are all based upon the police power.

It ought to be sufficient, to say that if the reserved right to control the property which is affected by a public interest was sufficient to justify this law, then there is no provision in the charter of any company which would be of any permanent value.

(b) *Is the statute a police regulation?*

There are quarters in which it is believed that there is no limit to the police power and that any enactment, no matter how it may bear upon the liberty or rights of a citizen, may be justified by a reference to the authority which inheres in all sovereignties because of that power. But it is still the law that the right to adopt police regulations is subject to the provisions of the Federal and State constitutions.

The foundation of the rule is found in the maxim "*Sic utere, etc.*" But we are not aware that this principle has ever been so far extended as to make a man liable for the lawful and careful use of his own property. On the contrary the whole purpose of the maxim is to enforce care upon the part of owners and to hold them responsible in case of a failure to do so. (Broom's Legal Maxims, 8th Ed., p. 365 et seq.)

Judge Cooley says: (Const. Lim. 5 Ed., p. 712). The limit to the exercise of police power must be this:

"Regulations must have reference to the comfort, "safety or welfare of society. They must not be in con- "flict with any of the provisions of the charter and they "must not under the pretense of regulations take from the

"corporation any of the essential rights and privileges "which the charter conferred. In short they must be a "police regulation in fact and not an amendment of the "charter in curtailment of the corporate franchises."

In Bronson vs. Meyer, 10 Barb., 223, the court said:

"Franchises of this description are partly of a public and partly of a private nature. So far as the accommodation of the public is concerned they are *publici juris*. So far as they require capital they are *priviti juris*. Certain duties and burdens are imposed on the grantees who are compensated therefor by the privilege of levying ferriage and security from spoliation, arising from the irrevocable nature of the grant. The State may legislate touching them so far as they are *publici juris*. Thus laws may be passed to prevent negligence or misconduct in conducting the ferries, to secure the safety of passengers from danger, but the State cannot take away the ferries themselves nor deprive the society of their legitimate rents and profits."

Police power is limited to that which affects the public morals, public health and public safety, and it has been held that the exclusiveness of the grant has no relation whatever to the public health, morals and safety. (Gas Co. vs. Gas Co., 115 U. S., 658.)

To review the various decisions rendered by the courts of this country, construing police laws, would be an endless and unsatisfactory task. It is sufficient to state that no law is valid as a police regulation which does not concern the health, morals or safety of the public, and the purpose of adopting police regulations is to prevent and to protect. In fact a regulation is almost always accompanied with a penalty to be inflicted in case of a violation of law. Police regulations require something to be done or prohibit the doing of something, and when it is omitted to be done or is done carelessly the person responsible is liable *but no law can be sustained as a police regulation*

which imposes a penalty or confers an action for the doing of that which has never been declared unlawful and which on the contrary is expressly made legal. Had the legislature of Missouri seen fit to require railroad companies to use screens, ash pans or spark arresters, or had it seen fit to require what should be done with reference to the care and maintenance of a right of way, the police power in the State might have authorized the enactment of such regulations.

It was argued in the case of Small vs. Railroad, 51 Iowa, 346, that the law of that State might be upheld as a police regulation because of the fact that in consequence of its enactment more care would be taken and the escape of fire would be of less occurrence. The Supreme Court of Iowa did not fail to recognize the lack of reason in such an argument, and it ought to be apparent to any mind that the feature of these laws of which we complain is not, that we are made liable for our lack of care, but because we are made liable for that which *cannot be prevented.* In the case cited the court said: "*There is no higher degree of care than faultlessness.*"

We have yet to find a case in which a liability has been sustained in consequence of a law justified as a police regulation, where the party compelled to respond was at the time the liability accrued in the exercise of care and doing that which he could not only rightfully do but which under his contract with the government he was compelled to do.

(c) *Does the State possess the right to amend the defendant's charter.*

It is untirely unnecessary for us to discuss the question of whether §2615 can be sustained as an amendment to defendant's charter, for the fact is that the right to amend was not reserved. "A charter cannot be amended unless the right to do so is reserved in the charter itself."

Cooley Const. Linn., 5 Ed., 337.

R. R. Co. vs. Carthage, 36 Oh. St., 631.

Trustees vs. Ind., 14 How., 268.

Dartmouth College vs. Woodward, 4 Wheat., 518.

Bank vs. Sharp, 6 How., 327.

Scotland Co. vs. Railroad, 65 Mo., 135.

Sloan vs. R. R. Co., 61 Mo., 24.

In State *ex rel.* Haussler vs. Greer, 78 Mo., 188, the corporation of which the parties were stockholders was organized prior to the adoption of the constitution of 1875. Its charter was not subject to alteration, suspension or repeal. The Supreme Court of Missouri held that the provision in the charter concerning the manner in which the directors could be selected could not in any way be affected by section 6, article 12, constitution of 1875. In that case Henry J., speaking for the court, said:—

"It was held in the Trustees of Dartmouth College vs. Woodward, 4 Wheat., 518, that the charter of a private corporation constitutes a contract between the corporation and the State within the meaning of that clause of the Constitution of the United States, which declares that no State 'shall pass any law impairing the obligation of contracts,' and that doctrine has been adopted by this and the courts of most if not all the States of the Union. Sloan vs. R. R. Co., 61 Mo., 30; Scotland Co. vs. R. R. Co., 65 Mo., 135. In the latter case it was contended that section 16, of article 11, of the constitution of 1865 operated to repeal a provision of defendant's charter exempting its property from taxation. That section of the constitution of 1865 reads as follows: 'No property, real or

personal, shall be exempt from taxation, except such as shall be used exclusively for public schools, and such as may belong to the United States, this State, the counties or to municipal corporations in the State.' The language of that section was broad enough to embrace the property of the defendant corporation as a subject of taxation, but the court, Judge Napton, delivering the opinion, observed: 'It is not now maintained by any judicial tribunal that a change in the political form of civil society has the magical effect of dissolving its moral obligations or impairing contracts previously vested. Constitutional conventions, which are of frequent occurrence in many of our States, it is believed, have no more power over vested rights than ordinary legislatures.''

If the right to vote stock in a certain manner is one of the provisions of a contract of incorporation which the courts will protect and not allow to be impaired by amendments subsequently adopted, is it not absurd to contend that the right of the defendant to use steam is not a right or franchise protected by the constitution?

In the above case it was argued that the law was within the police power, but the court most satisfactorily disposed of this contention, saying:—

"Nor can the section in question, with the construction placed upon it by the relator, be upheld as a police regulation. Bentham, in his general view of public offenses, defines the public police as follows: Police is in general a system of precaution, either for the prevention of crimes or calamities. Police regulations are such provisions of law as are designed to protect lives, limbs, health, comfort, and quiet of citizens, and to secure them in the enjoyment of their property, and the police power can be invoked for an interference with one's dominion over his own property to prevent such use of it, by him or its continuance in such conditions as would be detrimental to the com-

munity, and on no other grounds. Thorpe vs. Rutland R. R. Co., 27 Vt., 140. 'It is *prima facie* competent for any man to enjoy and deal with his own property as he chooses. He must, however, so enjoy and use it as not to affect injuriously the rights of his fellow subjects.' Broom's Legal Maxims. In Sloan vs. Pacific R. R. Co., 61 Mo., 24, Judge Napton speaking for the court, said: 'This term, police, is a very indefinite one.' Perhaps Judge Cooley's definition may be considered as exact as we shall find: 'Police regulations,' says the author, 'must have some reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter or curtailment of the corporate franchise.' "

We complain here, not of a liability for something which human foresight might have prevented, but of a rule that makes us liable for somethiug beyond our control.

If we consult the history of legislation in Missouri authorizing the incorporation of companies, we readily discover that the State has not only omitted to reserve the right to amend charters granted since 1865 but has expressly contracted that such charters shall not be amended.

The first general incorporation law of Missouri was that adopted in 1845, and this law, it should be stated, did not authorize the incorporation of railroad companies. The State at that time, however, evidently believed it necessary to retain the right to amend, and consequently we find the following section in the revised laws of that year: "The charter of every corporation that shall be hereafter granted by the legislature, shall be subject to

alteration, suspension and repeal in the discretion of the legislature." (Revised Statutes Mo., 1845, Chap. 34, Sec. 7.)

In the revision of 1855 we find the foregoing section continued in force as to business corporations (Revised Statutes Mo., 1855, Chap. 34, Sec. 7.) But it is noticeable that in the general law passed in 1855 providing for the incorporation of *railroad companies*, the legislature not only failed to retain the right to amend or alter charters thereafter granted but enacted the following section: "The legislature may at any time alter or amend this chapter but such alteration or amendment shall not impair the rights of companies previously organized." (Revised Statutes Mo., 1855, Chap. 39, Sec. 56.)

So that from 1855 to 1865 the charters granted to business corporations in Missouri under general laws were subject to amendment or repeal, while the charters granted railroad companies were expressly exempted from amendment or repeal.

In the revision of 1865 the provision which had previously appeared reserving to the legislature the right to amend or repeal charters *granted to business companies* was omitted and in lieu thereof the following enacted: "No charter of any corporation granted by the legislature "of this State shall be altered, suspended or repealed by "such legislature unless proof be made satisfactory to the "legislature that notice of such proposed alteration, sus-"pension or repeal has been given to the president, sec-"retary or other officer of such corporation for at least one "month before such will be passed." (General Statutes Mo., 1865, Chap. 62, Sec. 21.)

It might, with reason, be argued that the foregoing section was intended to apply only to charters granted by special act—but this much is certain, the right of amendment previovsly retained was surrendered as to corporations thereafter organized, and the only power to repeal

was that conferred by the section quoted, which section is found in Wagner's Statutes, Chap. 27, Sec. 23.

We find again in the revision of 1865 which remained in force and continued the law until the incorporation of the defendant company, the section originally adopted in 1855 (General Statutes Missouri, 1865, Chap. 63, Sec. 47). (Wagner's Statutes of Missouri, Art. 2, Chap. 37, Sec. 47).

It matters not what motives may have governed the legislature. The fact is plain that from the earliest legislation down to 1865 charters granted to private corporations, *other than railroads*, were subject to amendment or repeal. That charters granted to business corporations other than railroads subsequent to 1865 have not been subject to amendment or repeal, and finally that *no charter ever granted to any railroad company* under the general laws of this State has been subject to amendment or repeal, but on the contrary each and every charter has contained the express assurance that the State could not so amend or repeal as to "impair the rights of companies previously organized."

B.

Under the Statute Defendant is Denied the Equal Protection of the Laws.

We are aware that in some States statutes of this kind have been sustained because, as it is said railroad companies being engaged in a dangerous calling, should make good all losses occasioned in consequence of the operations of their trains.

But operating a railroad is as lawful and beneficial to the public as farming, manufacturing or dealing in wares, yet the farmer, the manufacturer, the dealer, are protected in their pursuits, while the railroad company is not. Steam

may be used in the mill, the factory, the steamboat, the threshing machine, and in many industries of the city without any special burden being imposed upon the owner if he only uses due care. But faultlessness does not excuse the railroad company. It alone must pay when it has been guilty of no negligence.

While railroads may in the country scatter more fire and cause more damage than do steam threshing machines, traction engines and saw mill engines, it is undoubtedly a fact that in the cities where the possibility of damages from fire is greatest, that the fires which destroy the property of innocent property holders have their origin in causes for which railroads are in no way responsible, and are largely and mainly traceable to the use of chemicals, oils and highly combustible materials, and to the employment of machinery and the storage of goods by persons or corporations engaged in callings equally as dangerous and hazardous as operation of a railroad. Is it equal protection before the law to hold that a railroad company must be held liable for an accidental escape of fire from a perfectly constructed engine, operated in the most careful manner, when the manufacturer whose building is stored with the most inflammable of materials, or whose occupation it is to manufacture the most dangerous of combustibles, is to be liable only in case he is proven guilty of negligence?

As the law stands in Missouri to-day, I may fill my building from cellar to garret with the most inflammable material; I may engage in a business which is liable at any moment through combustion or explosion to destroy millions of property; I may use any machine, no matter how great the possibility may be that in such use property will be endangered or destroyed; I may store paints and oils, I may use electricity, powder and dynamite, and will be responsible only for actual negligence, but if I attempt to serve the public by operating a railroad, I am liable for all damage that may possibly occur, notwith-

standing such occurrence may be due to an accident which could not be prevented by any invention which the mind of man could conceive or by any degree of care which he could use.

It cannot be said that the legislation in question operates equally upon all of one class. For are not steamboat owners carriers using steam? And by what rule are they to be excepted if railroad owners are to be held?

This law cannot be sustained because it does not give to railroad companies that protection in the lawful use of steam which is given to all others?

Pearson v. Portland, 69 Me., 269.

State v. Hays, 81 Mo. 586.

Ry. Co. vs. Moss, 60 Miss. 641.

Slaughter House Case, 16 Wall. 36.

R. R. Tax Case, 13 F. R. 722.

Santa Clara Co. vs. R. R., 118 U. S. 394.

C.

The Statute Takes Defendant's Property Without Due Process of Law.

"Due process of law" is equivalent to "law of the land," and is defined to mean a general law which is equal in its operation, which distributes equally the burdens of government, which bears with an impartial hand upon all citizens, and which has no friends to favor or foes to punish. In short, one rule for the rich and poor, the weak and the strong, the popular and the unpopular.

It does not mean, we assert, a law which punishes one for the doing of that which the sovereign power has legally authorized to be done.

In the case of Railroad vs. Lackey, 78 Ill. 57, where the legislature had endeavored to make railroad companies responsible for the funeral expenses attending the burial of all persons killed by their cars, the Supreme Court held that such a law was not "due process."

In the case of Small vs. Railroad, *supra*, the Supreme Court of Iowa, when passing upon a statute very similar to section 2615, and asked to give to it a construction such as is contended for in this case, said they would not "perpetrate the outrage in question." The words in quotation are the court's, not ours.

In Zeigler vs. Railroad, 68 Ala., 594, a statute was under consideration which declared that railroad corporations should be liable for all damages to live stock caused by their locomotives or trains, without reference to the skill or diligence with which the train was operated. The Supreme Court said:—

It results that no matter what care, prudence, watchfulness and skilled knowledge those having charge of a train may employ, still, if damage to live stock be caused by the train, the railroad corporation is responsible unless the person owning such live stock contribute to the injury; but permitting live stock to run at large shall not be considered as contributing to such injury. It is obvious that under this statute the highest diligence could not avoid frequent injuries to live stock, for which the corporation would be held accountable, if the act be constitutional. Two facts, and two only, are required to be shown, to authorize a recovery; ownership of the property and injury by the locomotive or cars of the railroad. The graver inquiry of capacity and diligence in the conduct of the train, the law assumes to determine or dispense with. Is this "due process of law," under section 7 of the declaration of rights? * * * Judge Cooley in his work on Constitutional Limitations, quotes with commendation the powerful and lucid definition of the phrase "due process

of law" as given by Mr. Webster in the great case of Dartmouth College vs. Woodward, 4 Wheat., 518, 581, as follows: "By law of land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country."

In another place during the same argument speaking of the powers of the legislature, and their separation from the judicial functions of the government, he said, "It (the legislature) shall not judge by act; it shall not decide by act; it shall not deprive by act; but it shall leave all these things to be tried and adjudged by the law of the land."

In the case of Hoke vs. Henderson, 4 Dev. Law., 1, 15, Chief Justice Ruffin said: "The terms, 'law of the land' do not mean merely an act of the general assembly. If they did every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken, imprisoned, disseised of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and be deprived of his property, his liberty and his life without crime? Yet all this he may suffer if an act of assembly applying those penalties on par-

ticular persons, or a particular class of persons, be in itself a law of the land within the sense of the constitution, for what is, in that sense, the law of the land must be duly observed by all and enforced by the courts. The clause itself means that such legislative acts as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals and a decision upon the matter of right as determined by the laws under which it rested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes. Due process of law undoubtedly means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Cooley Cons. Lim., 355. * * *

We have said above that the statute under discussion dispenses with all proof of the most material element of the wrong it seeks to redress. It declares that the railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business without a semblance of fault, negligence or want of skill in its employes; an injury which no human prudence or foresight could prevent; and yet the statute will not allow the railroad to exculpate itself by proof of the highest qualification and most watchful vigilance. THIS FALLS SHORT OF DUE PROCESS OF LAW. * * * *But when these very useful corporations conform to this strict rule of diligence, we can perceive no reason, in law or morals, for holding them to a stricter measure of accountability for inevitable misfortunes, than would be exacted from natural persons for injuries which result from unavoidable acci-

dent; or accidents which no human prudence can foresee or avert.

The equality of a law's operation being one of the true tests of its legality, we must ascertain if that equality does or does not exist by reference to the practical operation of the law. The aggregate damages annually sustained from fire in the City of St. Louis is much greater, doubtless, than the aggregate losses in all other portions of the State. Notwithstanding the supposed great danger from the operation of locomotives, it is nevertheless true that few accidental fires in the cities are due to such source. But explosions due to causes known and unknown, spontaneous combustion in laboratories, store-rooms and warehouses, defective chimneys, stacks, pipes and heaters, are all daily accredited with responsibility for great losses. In fact, the danger of fire in certain occupations is so great that proximity to the building in which such business is conducted is made the occasion for an increased insurance rate. We anticipate that an insurance company would prefer a risk adjacent to a railroad track to one adjacent to a flouring mill, an oil mill or a powder house. And yet, all these callings escape the unfair burden which is imposed upon railroad corporations by Section 2615.

Is a law equal in its operation which allows the manufacturer of powder, or the storer of dynamite to escape, when a railroad company must be held liable for the doing of that which is lawful? Does such a law distribute equally the burdens of government when it makes the railroad company an insurer and holds other users of steam liable only for negligence? Does it bear with an impartial hand upon all citizens alike, when upon one only is imposed this extraordinary liability for the use of steam? Can it be said that it has no friends to favor or foes to punish when all of those who use steam, railroads alone are made to suffer a penalty? Does it furnish one rule for the rich and poor alike, when it allows the farmer to

start a fire on his premises, or those adjoining his own, and be liable only in case of escape through his negligence, when railroad companies, doing an act equally as lawful and more necessary, are precluded from any defense?

We could not in fairness conclude this argument without calling the court's attention to those cases in which smiliar laws have in other jurisdictions been upheld.

The New England Cases.

The States of Maine, New Hampshire, Massachusetts and Connecticut have laws similar to the Missouri statute, * * * and while such laws have been upheld, they have never been assailed for the reason urged here, and their constitutionality having never been questioned, the decisions concerning them can have no weight or force in this argument.

In Vermont the statute is quite different, and simply places upon defendant the burden of proving that it was not guilty of negligence.

In Connecticut the law is very much like our own, with the single exception that there the plaintiff must show himself free from fault. In that State only of all the New England group has the law been attacked by counsel who have contended against its constitutionality.

Grissell vs. Railroad Company, 32 Am. & Eng. R. R. C., 349, is the case in which the Supreme Court of Connecticut upholds the law of that State. (Chap. 92, Connecticut Laws of 1891.) There the question of whether the statute denied railroads tha equal protection of the laws was decided in favor of the constitutionality of the law. No authorities were cited in support of the court's opinion, and we do not think that this court will be satisfied with the reasoning of that. The court refers to Railroad Company vs. Lackie, 78 Ill., p. 55, but utterly ignores the points which were really decided in that case,

saying, "This act attempted to make the company liable "though the person might die from a simple sickness "which may have been upon him when he entered the "car, or by his own hand, or by many other ways in "which the company would have no agency at all. The "difference between such a case and the one at bar is too "apparent for further comment."

We submit the Supreme Court of Connecticut absolutely failed to comprehend the breadth of the decision of the Supreme Court of Illinois, which held that a railroad company cannot in the absence of negligence be held responsible for the lawful use of its property.

The case of Zeigler vs. Railroad Company, *supra*, is pushed aside with the statement that the animals injured, were where they ought not to have been, the court being seemingly in ignorance of the fact that throughout the south and west it is the law that animals may rightfully go upon uninclosed premises when there is no local law to the contrary. The court again, in endeavoring to offer some reason why the law should be upheld as against the many occurring to every mind why it should not, likens the use of fire to the keeping of vicious domestic animals. Now it may be proper to consider the operation of a railroad and the confinement of ferocious animals upon a par, but we submit that if the State was to grant to individuals authority to own and breed ferocious animals, and imposed upon them the duty of so doing for fifty years, that by a subsequent legislative act the grantees could not be punished for what the State had agreed they might do. Again, a person can keep his animals within his own inclosure, but the owner of a railroad cannot prevent the escape of fire, and for this reason, if for no other, the comparison is unfair and unjust. Further reference is made to the fact that a person can be held liable for kindling a fire on his own land. Nor is this a fair comparison. It is not necessary for a

man to set fire to his field or his grass and if it was the rule might be quite different if his right to do so was a franchise.

The court further says:—

"It is because they allow them the privilege of taking "a narrow strip of land from each owner without his con- "sent along the route selected for the track and to traverse "the same at all hours of the day and night and at all sea- "sons, whether wet or dry, with locomotive engines that "scatter fire along the margin of the land not taken, "thereby, subjecting all combustible property to extraor- "dinary hazard and risk of loss, and that, too, for the sole "purposes of the corporation."

As we have already said it seems impossible for some courts, as well as some legislative bodies, to recognize that the operation of a railroad is not an unlawful act. It is a matter of general information that its original construction is in nine cases out of ten more eagerly sought by those who afterwards complain than by those who originally sought the investment. One would think from such declarations as the above that right of way is granted free to the corporations and that the person whose property is taken along the route of the same from the inception of the enterprise until the end of time, is a constant sufferer. The truth is that railroad companies are compelled to pay enormously for everything they obtain and quite often outrageously for everything afterwards damaged. That there are some benefits accruing to adjacent owners will be admitted by some, and ought to be proven to the satisfaction of others by the fact that those who build near a track before it is constructed are entitled to have all damages taken into consideration and those who build afterwards undoubtedly do so for their own benefit and for reasons which outweigh the risk. We confess that perhaps all of this has nothing to do with the power of the legislature, but it certainly is, we think, worthy of as much consider-

ation as has been given to the opposite view in the case above cited. In that case the court seemed to recognize a point which was not made there and which is insisted upon here: that the reserved right to amend the charter furnished authority for the law in question. The court said: "How then can it transcend the limits of just and "valid legislation * * * where the charter, as in this "case, is an open one expressly made subject to all gen- "eral laws."

Railroad companies are quite frequently interested in costly structures and have large amounts of money invested in buildings which are constantly exposed to danger from fire. The nature of the buildings, like factories, barns, oil depots and warehouses, ordinarily located adjacent to their premises, is such as to make the hazard exceedingly great. Railroad companies likewise have costly bridges, trestles and other destructable portions of their roadway, all of which are constantly exposed to danger from fire and some of which are occasionally burned in consequence of fire spreading from adjoining farms and structures. If fire escapes through no fault of the company and spreads to the farm, what equality is there in a law which provides a different rule from that which governs when fire is set out on the farm and spreads to the property of the company?

None of the New England decisions seem to recognize that in cases of fire started by a locomotive engine the origin is due to a use not only expressly authorized, but imperatively demanded by the State. In the case last cited, reference is made to Redfield, Pierce and Wood, and it would appear from the quotations set forth that those authors had all given the subject careful consideration and upheld the constitutionality of these laws, but a reference to the pages cited will show that neither of them did more than to briefly state the rule and refer for their

authority to the cases in which the question of an impairment of contract had never been raised.

Reference is also made in the *Crissell case* to Rodemacher vs. R. R., 41 Iowa., 297, where the constitutionality of a law similar in its features to ours was upheld. The court, however, fails to note that the decision in the Rodemacher case was practically reversed in Small vs. Railroad, 50 Iowa, 340. The Massachusetts cases are predicted upon the doctrine announced in Ingersoll vs. Railroad, 8 Allen, 38: That the legislature has chosen to make it "a condition upon which the statute shall operate, etc.," and recognize that in order for the law to be upheld the legislature must have the power to impose the liability *as a condition*.

There is nothing, however, in the Connecticut case to throw any light upon the question of constitutionality urged here and based upon our contention that § 2615 impairs the obligations of a contract.

The Colorado Law.

A similar law is in force in Colorado, and its constitionality was upheld in De Busk vs. R. R., 38 Am. & Eng. R. R. Case, 321.

In that case the court, unlike the Supreme Court of Connecticut, recognized Zeigler vs. R. R. Co., 58 Ala., 599, as an authority bearing legitimately upon the question under consideration, but refused to follow it. Its decision rests chiefly upon Rodemacher vs. Railroad Company, *supra* (Supt. Ct. of Iowa), which, as we have seen, was subsequently modified by a decision which favors the construction we contend for.

It will also be observed that in the *De Busk* case the cases and authorities cited by the court have no direct bearing upon the question of an impairment of contract, and that the point relied upon here was not called to the

attention of the court. It is difficult to feel that the Colorado court was entirely satisfied with the reasonings which it gave when we read these concluding words of its opinion: "By many courts the warrant for their enactment is "ascribed to the police power of the State. But we have "not found it necessary to attempt a particular classifica- "tion in order to sustain their validity. * * * *We see "no reason why Colorado should take the lead in declaring "such acts unconstitutional.* * * * Undoubtedly "the enforcement of such acts may stimulate railroad "companies to the greatest diligence to prevent fires on "their road."

What greater diligence can there be than faultlessness? What court has found warrant for the enactment of these laws in police power?

The questions involved are Federal ones, having never received a construction by any court of the United States so far as we have been able to discover. We submit that the Arkansas, Alabama and Illinois cases cited, are much more in harmony with the Constitution of the United States as construed by this court, than are the Colorado and Connecticut cases.

"Railroads are useful to all the community, in the "development of the resources and the increase of the "wealth of the State. The exercise of their franchises "and the pursuit of their business is lawful, and to hold "them liable for unavoidable accidents which could not "have been prevented by due care, is contrary to reason. "It is not within the province of the legislature to divest "rights by prescribing to the courts what should be con- "clusive evidence,"

R. R. vs. Payne, 33 Arkansas, 819.

In Miller vs. Martin, 16 Mo., 508, the defendant in order to remove the obstacles which impeded his plowing,

put fire to them. The fire escaped and burned the plaintiff's fencing and a quantity of his rails. There was no negligence shown and the court held the defendant not liable. Judge Scott delivering the opinion said:

"It must be acknowledged that it is a well settled "principle of our law that if the party is in the prosecution "of a lawful act, an action does not lie for an injury "resulting from an unavoidable accident which occurs "without any blame or fault on his part."

In Khale vs. Hobin, 30 Mo. App., 476, the court said:

"In clearing timber lands fires are set out to burn up "the brush and roots and log heaps before the fence is "built and it will be readily admitted that if this was the "sole design of the fire the farmer would not be responsi- "ble for accidental escape of fire to adjoining property or "woods."

In Catron vs. Nichols, 81 Mo., 82, Hough, C. J., speaking for the court, said:

"A farmer has an undoubted right to set out a fire in "order to prepare his land for cultivation and if he does "do so with a requisite degree of care and prudently man- "ages the same after set out he cannot be held liable "for any accidental or anavoidable injury occasioned "thereby."

It is the law in this State that the farmer may rightfully set fire to his premises for the purpose of destroying the stubble, grass and weeds upon his land. It is likewise the law that a railroad company may use steam as a motor. Certainly a little spark from a smokestack is not more hazardous or dangerous than a flame sweeping entirely across a farm. But is it equality to say that he who is responsible for the escape of a spark can have no defense, while the one who converts acres into a flame shall be held liable only in case he is proven guilty of negligence?

II.

Section 2615, if Valid, Only Makes the Fact of the Injury Prima Facie Evidence of Negligence.

It is a principle of law governing the interpretation of legislative enactments that when a particular statute is subject to two constructions, one of which is constitutional and the other is not, that construction will be favored which upholds the law. We have seen that Section 2615 cannot be sustained if that construction is placed upon it which was given to it by the court below. The position of the appellant in this case is that the act, if construed to impose an absolute liability, is unconstitutional, but it can be upheld if construed as making the fact of injury *prima facie* evidence of negligence. There is good authority for this view in the statute.

In Iowa they have a law which reads as follows:—

Any corporation operating a railway shall be liable for all damages by fire set out or caused by the operation of such railroad and such damages may be recovered by the party damaged in the same manner as set forth in this section in regard to stock, except as to double damages. (Code, Chap. 73, § 1289.)

While the constitutionality of this law was upheld by the Supreme Court of Iowa in the case of Rodemacher vs. Railroad, *supra*, subsequently in the case of Small vs. Railroad, 51 Iowa, 340, it was held that the statute made the fact of an injury only *prima facie* evidence of negligence which might be rebutted by proof of freedom from negligence.

While various reasons were assigned, a careful reading of the decision will show that the principal reasons

which governed the court in its interpretation are found in the following language:—

"Where a statute is of doubtful construction it is "proper to give some weight of what might be considered "as demanded or forbidden by public interest. This "consideration so far as it is entitled to any influence in "this case, is unfavorable to the construction contended "for by the plaintiff. The statute, as construed by him, is "designed to afford an indemnity against carelessness as "well as pure accidents. Railroad companies cannot "control the erection of buildings or the accumulation of "combustibles outside of the one hundred feet held for "right of way. Cities grow upon a railroad and because "of it, built, in the absence of ordinances, precisely as the "owner of each building sees fit to build it. Under the "ruling in M. & St. P. R. Co. vs. Kellogg, 4 Otto, 469, "and under the construction of the statute in question "contended for by the plaintiff, a railroad company may "be held liable for the destruction of a whole city, occur- "curing without the company's fault. Insurance com- "panies require that the insured shall carry a part of the "risk. Long experience has shown this to be necessary. "But it is scarcely more necessary for the protection of "insurance companies than the public. The statute in "question, under the construction contended for by the "plaintiff, is designed to afford comple indemnity, and it "would prove such, perhaps, in small fires, but probably "not in large ones. It is urged that the statute construed "as the plaintiffs contend for would have the effect to "secure a higher degree of care on the part of railroad "companies: but this is not so. *There is no higher decree "of care than faultlessness.* For negligence railroad com- "panies are liable without the statute. The only effect, so "far as their action is concerned, of imposing upon them "the liability in question, would be to compel them to "increase their charges. It would only make railroads more

"expensive things to own and operate, and more expen-
"sive means of transportation and travel. The burden
"would fall upon the community at large. The cost of
"roads even now consists in part of the right of way dam-
"ages, which, as we have seen, include compensation for
"the exposure created by them. This, like any other
"element of cost, enhances their expensiveness as means
"of transportation and travel. Why in addition to this,
"and as a part of the expense of operating them, the
"patrons would be burdened with paying for burned ele-
"vators erected by their owners within what they knew,
"or should have known, was dangerous proximity to the
"road or for burned stacks of hay and grain which could
"have been protected by plowing a few furrows of ground
"we are unable to see."

"A provision by the legislature that notwithstanding
"such payment, the company, and not the land owner,
"should sustain whatever loss occurs, if not unconstitu-
"tional, would be manifestly unjust; and we are not put
"to a construction upon a statute which would manifestly
"effectuate injustice if it is susceptible of a different con-
"struction."

In Arkansas the law is as follows:

"All railroad companies which are now or may here-
after be built and operated in whole or in part in this State, shall be responsible for all damages sustained or caused by the running of trains in this State." (Mansfield's Digest, Sec. 5537.)

Dill vs. Railroad Company, 32 Am. & Eng. R. R. C., 324, was an action brought for the purpose of recovering damages caused by fire. The court held that the liability was not absolute, but only created *prima facie* case of negligence, which could be rebutted by proof of care, saying: "In Railroad Company vs. Payne, 33 Ark., 818,
"it was decided that it was not the intention of the legis-
"lature to make railroad companies responsible for all

"damages done by trains irrespective of the question of "negligence, but the effect of the statute was to shift the "burden of proof. Thus, when stock is killed by a train, "the presumption arises that the casualty resulted from "want of due care, but the presumption may be rebutted "by proof. This decision has been strictly adhered to "ever since, and the reasons upon which it is based are "equally applicable to injuries by fire."

The decisions of this court are in harmony with the Iowa and Arkansas decisions.

Section 2611, Revised Statutes of 1889 (Missouri) makes railroad companies liable for all damages which shall be done to live stock, occasioned by reason of the railroad company's failure to build and maintain fences upon the line of its road.

This statute has been sustained as a police regulation enacted for the benefit of the traveling public. Upon the face of the statute the liability is absolute in case of a failure not only to build but to maintain fences sufficient to keep live stock away from the track. Notwithstanding the absolute liability apparently created by the statute, this court has uniformly held that after the fences have been built the company is only required to use due care in their maintenance and is liable for stock injured through a defective fence only when the company has been guilty of negligence in repairing it.

Section 4428 Revised Statutes 1889, (Missouri), is as follows:

When any animal or animals shall be killed or injured by the cars, locomotives or other carriages used on any railroad in this State, the owner of such animal or animals may recover the value thereof, in an action against the company, or corporation running such railroad, without any proof of negligence, unskillfulness or misconduct on the part of the officers, servants or agents of such company: but this section shall not apply to any accident,

occurring on any portion of such road that may be inclosed by a lawful fence, or in the crossing of any public highway.

This section would seem to impose an absolute liability, but as construed by the courts of this State it is supplementary to the section previously quoted and a legislative declaration that the failure to fence where the road can be fenced without danger to the public or interference with the company's business, is in itself negligence, and this section although containing terms which would seemingly make an absolute liability has been held by this court to only constitute a *prima facie* case against the company.

Under Sections 4432 and 4433 of the above statutes, persons who willfully set out fire in woods, marshes or prairies are made absolutely liable for the damages occasioned thereby. These sections are certainly as broad in their terms as Section 2615, yet the courts of this State have given them a construction which we insist should be applied to the section under consideration.

Before referring to the cases which we shall hereafter cite, we desire to state that these sections (4432 and 4433) were formerly limited in their operation by a section which made the law inapplicable to any one who was burning up anything on his own land and where the fire accidentally escaped (see Revised Statutes 1845). Subsequently the Supreme Court in Finley vs. Langston, 12 Mo., 120, construed the section according to the plain intent of the language used, and the legislature amended the section which protected the farmer engaged in clearing up his land and left the law as it now stands. This would certainly show, if the court is to resort to the meaning of words only that the legislature intended to make the farmer liable regardless of the purpose which governed him in setting out the fire.

In Khale vs. Hobin, 30 Mo. App., 476, the Court of Appeals refused to hold that the statute made even a *prima facie* case, and said:

"A farmer would not be answerable if it (the fire) "accidentally escaped to an adjoining prairie or woods."

In Catron vs. Nichols, 81 Mo., 82, the plaintiff brought himself within one of the sections of the statutes quoted. The court held that defendant was liable only for negligence and refused to construe the statute as making even a *prima facie* case, saying:

"The farmer has an undoubted right to set out a fire in order to prepare his own land for cultivation and he would be held liable only for accidental or unavoidable injury occasioned thereby."

This court has held that under section 2611 it is necessary for the plaintiff to show negligence which in the case of the original construction of the fence is fixed by statute and justified by the police laws of the State, and in the case of the subsequent maintenance of a fence is determined by the care used; it has placed a like construction on Section 4428 and held in terms that such section creates a *prima facie* case only (90 Mo., 127); it has held that Sections 4432 and 4433 do not impose a liability which is absolute. How then can it consistently hold that Section 2615 does more than to make a *prima facie* case of negligence against the defendant?

III.

THE STATUTE ONLY INCLUDES PROPERTY UPON WHICH DEFENDANT COULD HAVE OBTAINED INSURANCE.

If the statute is to receive the sanction of this court then effect must be given to all its terms and in ascertaining the extent of defendant's liability, every portion must be considered with reference to the whole.

By similar statutes in most other States railroad companies are given an insurable interest in the property along the line of their railroad. The legislature in adopting this provision undoubtedly believed that railroad companies could, if they desired, indemnify themselves against all losses for which they were made responsible and that the practical effect of the act would be to shift upon the railroad companies the burden of carrying such insurance as otherwise would have to be borne by the owner. It was plainly the intention of the legislature that the company should not be responsible for that which they could not insure.

The Maine law is practically the same as the Missouri law. In construing it the Supreme Court of that State said in Chapman vs. Railroad, 37 Me., 92: "*It "was manifestly not the intention of the statute to extend "the company's liability beyond the means afforded for its "protection.*

"Their right to insure is co-extensive with their lia- "bility in case of loss. To make this right to insure of "any value the property must be of such a character as to "render the insurance practicable, * * * to hold that "the liability extends to those articles of movable property "which have no established location, would be unreason- "able."

In this case the defendant offered to prove that from the very nature of shrubbery, flowers, ornamental trees, and property of a like character there is an inherent impossibility of obtaining insurance and that it is impracticable from a business standpoint to insure such property and defendant then offered to prove why it is impracticable.

In Grissell vs. R. R. Co., *supra*, the court clearly recognized that where the article destroyed was not susceptible of insurance that then such property would be excepted from the operation of the law, saying: "If "there was an inherent impossibility of obtaining insur-

"ance upon any particular species of property the argu-"ment would have more force, but there is no such impos-"sibility." This is just what the defendant demanded the right to show. And we assert that it was not the province of the court to determine whether it is practicable to obtain insurance on any given kind of property. If we are wrong then we insist that this court should take knowledge of the fact that there are no companies which do or offer to insure ornamental trees, shrubbery, vines, flowers and property of like character, and that from the inherent nature of these things their value can never be ascertained, depending as it does on the value of the land of which it is a part, and cannot therefore be insured.

IV.

Personal Property Not Within the Statute.

It was certainly error for the court to allow the plaintiff to recover the value of the personal property stored in the house and barn. This is certainly contrary to the intent of the statute. (Chapman vs. R. R., *supra*.)

V.

CONTRIBUTORY NEGLIGENCE AS A DEFENSE.

Defendant was not only held to an absolute liability but was denied the right to set up plaintiff's contributory negligence. Although nine witnesses testified that the plaintiff's premises were covered with weeds, grass and other highly inflammable material which had been allowed to remain there for years, and although the testimony tended to show that the place had been practically neglected for ten years, during most of which time no one

had lived upon it, still defendant's instructions based upon such evidence were refused.

It does not seem that public policy would demand that plaintiff should be held to some degree of care and that he could not be allowed either in his own case or as against another to set up the right to maintain his premises in that grossly negligent condition established by the defendant's evidence. Under the decision of the court in this case the plaintiff could not only have negligently allowed his place to become filled with weeds, grass and combustible matter without being held responsible for such condition *but could recover for those damages augmented by his own negligence.* It requires no review of the facts in this case for the court to assume that the grass and weeds on plaintiff's premises must have been exceedingly high. The fire swept over a twelve acre tract so swiftly that despite the resistance of a man who was fighting the same, the various buildings and property described in plaintiff's petition were destroyed.

In Massachusetts as has already been stated, there is a law similar to Section 2615 (Statutes of 1840, Chap. 85, Sec. 1). The Supreme Court of that State said in Ross vs. Railroad, 6 Allen, 92:

"As the case stood before the jury it was a proper "one to be submitted to practical men having all the facts "before them to determine whether due care had been "exercised (by the plaintiff)."

In this State, we believe that no defendant has ever been refused the right to have a jury consider the plaintiff's contributory negligence when the same was plead and there was any evidence to support the charge.

VI.

PLAINTIFF TWICE COMPENSATED.

At the trial defendant offered to prove that its right of way was a portion of the property described in

plaintiff's petition; that when its railroad was built through plaintiff's premises in 1882, condemnation proceedings were instituted against plaintiff to which he was made a party; that after the commissioners had been appointed the plaintiff appeared before them in his own behalf, and insisted orally and in writing that the damages to the portion of his place not actually taken, would be exceedingly great in consequence of the risk and danger from fire to which the property would be subjected.

It was the law of Missouri at the time these condemnation proceedings were had, and is in fact the law of all States at the present time, where laws like Section 2615 are not in force, that a proper element of damages in condemnation proceedings is the danger from accidental fire. While the proceedings referred to were pending, it was agreed between the parties to this suit, who were the same in that, that the award of the commissioners should be accepted as final, and that the sum of $9000 awarded included compensation for the damage to the plaintiff's premises in consequence of risk from accidental fires. From the time of the payment of the award and the settlement of the controversy to the occurrence of the fire, there was no change in the buildings or in the premises of the plaintiff, except such as were due to decay and neglect. Now we are at a loss to know what principle of law it is, under which it can be rightfully held that the plaintiff admittedly entitled at the time of the proceedings to an award which would cover damages from accidental fires, can subsequently be awarded additional compensation for losses solely attributable to such a source. Plaintiff was paid once for the risk he was to run. He received compensation for a damage which might possibly occur. He received, it must be presumed, an amount which satisfied him that he was protected against all loss. The amount which he received on this account would doubtless have covered the additional cost

of insurance for all time to come. That he was fully compensated one must believe, because not only of the amount of the award, but because it was willingly accepted. We refer only to accidental fires, because for those traceable to negligence, the company is admittedly liable.

The court in Small vs. R. R., *supra*, held that to give a different construction to the law would be to render it unconstitutional.

It is true that there are cases in Massachusetts, and perhaps other eastern States, in which the courts have held that damages could be recovered by plaintiffs whose property had been previously condemned but upon investigation it will be discovered that in most if not all these cases one of two things existed: either the commissioners or jury were not allowed to consider the element of damage from risk of fire, or there was no proof offered to show that the very subject of the suit, to-wit, damage for accidental fire, was an element considered by the commissioners or jury.

Grissell vs. Railroad, *supra*, may be cited as a case contrary to the Iowa decision. But in that case the Supreme Court said: "The record is silent as to when "the land in question was taken or whether anything "at the time was claimed for damages on account of "the risk from fire of the property now owned by "plaintiff. No question of these facts was made in "the court below and of course is not to be entertained "in this court for the purpose of a decision. * * * "We reserve a final decision of the question for a case in "which it properly arises."

Plaintiff has received that which in law and doubtless in fact was amply sufficient to insure him against any increased risk incidental to the construction of defendant's railroad. If the fire complained of was caused by negligence of the company, (and the burden of showing to the satisfaction of the jury that it was not, rests upon

the defendant,) he is entitled to recover. Surely this court will not hold that the plaintiff was entitled when his property was taken to an amount which would protect him for all time to come against accidental fires and at the same time hold that he is entitled to additional compensation now. There would be in such a judgment an injustice so manifest that we feel confident it will never be rendered.

VI.

It Was Competent to Show the Amount of Plaintiff's Insurance.

The statute is clearly not a police regulation, for laws of that kind either prohibit the doing of certain things or direct how they should be done. The statute does neither. It simply declares a liability for the doing of an unauthorized act.

It therefore can be justified, if it can be justified at all, only on the theory that it is a charter amendment. If defendant's charter was subject to amendment then evidence of the insurance paid plaintiff was admissible, for such amendment would be a contract on the part of the defendant that it would stand as an insurer for all the property located on its line. The liability, therefore, if any there could be, would be the liability of an insurer. Defendant offered to prove that plaintiff had obtained a general insurance upon his property covering losses from all sources, including fire set out by defendant's engines. There was then, if the statue be valid, at the time the loss occurred a double insurance. That being true the railroad company was entitled to contribution from its co-insurer and it was lawful and proper for the court to have admitted the evidence offered for the purpose of reducing defendant's liability to its

equitable proportion of the whole. We are not contending that the defendant is entitled to the full benefit of the $10,000 insurance paid to the plaintiff, but we do insist that defendant's liability, if any there was, was the liability of an insurer, attaching in consequence of the contract it was forced to make with the State. That in such cases the defendant is entitled to contribution from the other insurers, we think there is no doubt.

Because of the manifest errors complained of the judgment of the trial court should be reversed.

L. F. PARKER,

Attorney for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
Plaintiff in Error,
vs.
LEONARD MATTHEWS.
No. 105.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

SPECIFICATION OF ERRORS.

L. F. PARKER,
Attorney for Plaintiff in Error.

W. J. KESL, 317 OLIVE ST.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, *Plaintiff in Error*, *vs.* LEONARD MATTHEWS.	No. 105.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

SPECIFICATION OF ERRORS.

Plaintiff in error begs leave to submit the following as its specification of errors:

I.

The Circuit Court erred in refusing to permit the plaintiff in error to show,

"*First*. That in their report as commissioners they awarded to plaintiff the gross sum of $9000 as damages for all of his property.

Second. That the sum of $3000 was allowed as special damage to the home place, being the eleven acres and a fraction described in the petition in this case.

Third. That in estimating the damage they took into consideration the danger to said property from accidental fire set out by engines which would be used on said railroad.

Fourth. That the parties to said proceedings agreed to abide the findings of said commissioners and finally settled in accordance with that report."

II.

The Circuit Court erred in refusing to permit the defendant to show that "The Commercial Assurance Company of Detroit, the Fire and Marine Insurance Company and the Imperial Fire Insurance Company were carrying insurance on the house and barn of plaintiff which was destroyed by fire on August 1, 1887, and that they had paid in cash to the plaintiff $10,000 on account of the loss sustained by him on account of that fire, being the same fire and loss named in the petition in this case."

III.

The Circuit Court erred in giving instruction asked by the defendant in the court below.

"The court instructs the jury that if you believe from the evidence that during the month of August, 1887, plaintiff was the owner of the land in the petition described, and defendant was the owner or operating a railroad adjoining said land, having locomotive engines in use upon said road, and that on the 9th day of August, 1887, fire was communicated from a locomotive engine then in use upon the railroad owned or operated by defendant, to plaintiff's property on his said land, and thereby the build-

ings and other property in the petition mentioned or any of it were destroyed, then the jury will find for the plaintiff."

IV.

The Circuit Court erred in refusing the first instruction asked by the defendant in the court below.

"1st. If the jury believe from the evidence that upon the location of defendant's road through the premises described in plaintiff's petition, the plaintiff and defendant could not agree upon the compensation to which plaintiff was entitled for damages for running its road through the same and that proceedings were instituted by the defendant to condemn a right of way through said premises and that commissioners were duly appointed to assess said damages, that said commissioners did assess said damages and that said cause and proceedings was compromised by defendant paying to plaintiff and plaintiff receiving from defendant the amount of such assessment, then plaintiff cannot recover provided such proceedings and compromise were had prior to March 31st, 1887."

V.

The Circuit Court erred in refusing the second instruction asked by defendant in the court below.

"2nd. If the jury believe from the evidence that upon the location of defendant's road through the premises described in plaintiff's petition that plaintiff was entitled for damages for running its road through the same and that proceedings were instituted by the defendant to condemn a right of way through said premises and that commissioners were duly appointed to assess the said damages and that commissioners did assess said damages

and that said cause and proceedings were compromised by defendant paying to plaintiff and plaintiff receiving from defendant the amount of such assessment and that in such assessment the danger to plaintiff property by accidental fire was taken into consideration by said commissioners and by plaintiff and defendant, then plaintiff cannot recover provided such proceeding and compromise was had prior to March 31st, 1887."

VI.

The Circuit Court erred in refusing instruction No. 3 asked by defendant in the court below.

"3rd. The jury is instructed that the liability of defendant upon the cause of action set forth in the second count of plaintiff petition is co-extensive with its right to insure the property destroyed and the defendant is not liable on said second count for the destruction of any property, which from its inherent nature was uninsurable."

VII.

The Circuit Court erred in refusing to instruct the jury upon request of defendant in the court below, that "under the pleadings and the evidence the plaintiff was (is) not entitled to recover on the second count in his petition."

VIII.

Because the Supreme Court of Missouri erred in holding that the Supreme Court of the State of Missouri erred in holding as a valid enactment the following act, passed by the legislature of said State of Missouri, March 31, 1887, said act being as follows:

"An act to establish the responsibility of railroad corporations, companies, and persons owning or operating railroads for damages by fire communicated by locomotive engines."

Be it enacted by the General Assembly of the State of Missouri as follows:

"SECTION 1. Each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages.

SEC. 2. The term 'railroad corporation' contained in this act shall be deemed and taken to mean all corporations, companies and individuals now owning or operating, or which may hereafter own or operate any railroad in this State."

Because said act denies to the plaintiff in error, the equal protection of the law, contrary to the provisions of Sec. 1, Art. 14, of the amendments to the Constitution of the United States.

IX.

The said Supreme Court of the State of Missouri erred in holding said last-named act a valid enactment, because it deprives the plaintiff in error of its property without due process of law, contrary to the provisions of Art. 5 of the amendments to the Constitution of the United States.

X.

Said Supreme Court of the State of Missouri erred in holding said last-named act—valid enactment, because it impairs the obligation of a contract made between the State of Missouri and the plaintiff in error, contrary to the provisions of Art. I, Sec. 10, of the Constitution of the United States.

XI.

Said Supreme Court of the State of Missouri erred in affirming the judgment against the plaintiff in error.

L. F. PARKER,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
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CLERK.

165-1

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
Plaintiff in Error,
vs.
LEONARD MATTHEWS,
Defendant in Error.

No. 105.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR DEFENDANT IN ERROR.

PERCY WERNER,
Attorney for Defendant in Error.

GARLAND POLLARD,
Of Counsel.

CENTRAL LAW JOURNAL CO., ST. LOUIS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
Plaintiff in Error,
vs.
LEONARD MATTHEWS,
Defendant in Error.

No. 105.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR DEFENDANT IN ERROR.

I.

The statute in question does not deny defendant in error the equal protection of the law.

Barbier v. Connolly, 113 U. S. 27;
Soon Hing v. Crowley, *Id.* 703;

Mo. Pac. Ry. Co. v. Humes, 115 U. S. 512;
Minneapolis Ry. Co. v. Beckwith, 129 U. S. 26;
Charlotte, etc. R. R. Co. v. Gibbes, 142 U. S. 386;
Mo. Pac. Ry. Co. v. Mackey, 127 U. S. 205.

II.

It does not deprive plaintiff in error of its property without due process of law.

Mo. Pac. Ry. Co. v. Humes, 115 U. S. 512;
Nashville, etc. Ry. Co. v. Alabama, 128 U. S. 96;
Fertilizing Co. v. Hyde Park, 97 U. S. 659;
Beer Co. v. Massachusetts, 97 U. S, 25;
Mo. Pac. Ry. Co. v. Mackey, 127 U. S. 205.

III.

It does not impair the obligations of a contract made between the State of Missouri and plaintiff in error.

Pearsall v. Great Northern Ry., 161 U. S. 671;
Fertilizing Co. v. Hyde Park, 97 U. S. 659;
Cooley on Constitutional Limitations (6th Ed.), ch. 16, pp. 707-710;
Const. of Mo., Art. 12, Secs. 5 and 14.

IV.

Statutes substantially the same as that of Missouri here drawn in question, imposing liability for dam-

ages caused by railroad locomotives, irrespective of negligence, have in no case been held unconstitutional, though passing under judicial review for a period of more than fifty years.

Massachusetts:

Lyman v. Boston & Wor. R. Co., 4 Cush. 288;
Hart v. Western R. R. Co., 13 Metc. 105;
Ross v. Boston & Wor. R. Co., 6 Allen, 90;
Pierce v. Worcester R. Co., 105 Mass. 199;
Trask v. Hartford & N. H. R. Co., 16 Gray, 71.

Maine:

Chapman v. Atl. & St. L. R. Co., 37 Me. 92;
Pratt v. Atl. & St. L. R. Co., 42 Me. 579.

New Hampshire:

Hooksett v. Concord R. Co., 38 N. H. 242;
Rowell v. Railroad, 57 N. H. 132;
Smith v. Railroad, 63 N. H. 25.

Connecticut:

Grissel v. Housatonic R. Co., 54 Conn. 447 (1886);
Martin v. N. Y. & N. E. R. Co., 62 Conn. 331.

Iowa:

Rodemacher v. M. & St. P. R. Co., 41 Iowa, 297;
Small v. Railroad, 50 Iowa, 340.

Colorado:

U. P. R. R. Co. v. De Busk, 12 Col. 294 (1888).

South Carolina:

McCandless v. Richmond & D. R. Co., 38 S. C. 103.

Missouri:

Matthews v. St. L. & S. F. Ry. Co., 121 Mo. 298 (1893);

Campbell v. Mo. Pac. Ry. Co., *Id.* 340.

ARGUMENT.

The constitutionality of the following statute of the State of Missouri is questioned by plaintiff in error, viz.:

"An act to establish the responsibility of railroad corporations, companies, and persons owning or operating railroads for damages by fire communicated by locomotive engines."

"Be it enacted by the General Assembly of the State of Missouri as follows:

Sec. 1. Each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages.

Sec. 2. The term 'railroad corporation,' contained in this act, shall be deemed and taken to mean all

corporations, companies, and individuals now owning or operating, or which may hereafter own or operate, any railroad in the State. Approved March 31, 1887."

The invalidity of this enactment is asserted to lie in this that it:

1st. Denies to plaintiff in error the equal protection of the law.

2d. Deprives plaintiff in error of its property without due process of law.

3d. Impairs the obligations of a contract made between the State of Missouri and the plaintiff in error;

all contrary to the provisions of the constitution of the United States respectively pointed out. We will consider these points separately.

I.

This act does not deny to plaintiff in error the "equal protection of the law," which is guaranteed by the constitution. By its very terms it is made to apply to "all corporations, companies and individuals now owning or operating, or which may hereafter own or operate, any railroad in this State." As said by this court, in Mo. Pac. Ry. v. Humes, 115 U. S. 512, in which the constitutionality of the railroad fencing law was raised: "The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability when its road passes through, along or adjoining inclosed or cultivated fields, or uninclosed lands. There is no evasion of the rule of equality where all companies are subjected to the

same duties and liabilities under similar circumstances." (p. 523.) So in Barbier v. Connolly, 113 U. S. 27, where the constitutionality of the ordinance regulating public laundries in San Francisco was attacked upon the same ground, this court said (p. 31): "It is not legislation discriminating against anyone. All persons engaged in the same business within it are treated alike, are subject to the same restrictions and are entitled to the same privileges under similar conditions." The meaning of this constitutional provision regarding equal protection of the law is thus unmistakable. It is not necessary that the act in question should apply to every person who finds it necessary to use fire or to generate steam, for whatsoever purpose, in the prosecution of his business; it is sufficient if it apply indiscriminately to all persons who use locomotive engines on railroads, and this it does. As said by this court in discussing the constitutionality of the fellow-servant law of Kansas: "It is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage-coaches and to persons and corporations using steam in manufactories. Mo. Pac. Ry. Co. v. Mackey, 127 U. S. 205-210."

II.

This act does not deprive plaintiff in error of its property "without due process of law."

In Mo. Pac. Ry. Co. v. Humes, 115 U. S. 512, Justice Field says, referring to the same constitutional provision (p. 519): "From the number of instances in which these words are invoked to set

aside the legislation of the States, there is abundant evidence, as observed by Mr. Justice Miller in the case referred to, "that there exists some strange misconception of the scope of this provision, as found in the Fourteenth Amendment." It seems, as he states, to be looked upon "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." This language was used in 1877, and now, after a lapse of eight years, it may be repeated with an expression of increased surprise at the continued misconception of the purpose of the provision. *If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law.*"

That the statute in question falls within the "legitimate sphere of legislative power" there can be no question. It is of the same character as the Fencing Laws, the Fellow Servant Acts, and the numerous police and remedial statutes passed regulating the operation of railways in the interest of the safety of persons and property. And no question is raised as to the mode of enforcement.

III.

The act in question does not impair the obliga-

tion of the charter contract between the State of Missouri and plaintiff in error. Plaintiff in error is a corporation organized under the general laws of the State of Missouri from which it derives all of its powers. The clause of its "contract" with the State which it claims is impaired by the act in question is as follows (Rev. Stat. 1889, Sec. 2543) viz:

"*Sixth.* To take and convey persons and property on their railroad by the power or force of steam or of animals or by any mechanical power and to receive compensation therefor."

On the subject of the construction of charter powers, Justice Swayne, in Fertilizing Co. v. Hyde Park, 97 U. S. 659, says (p. 666): "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

In the light of this language let us examine what is claimed by plaintiff in error as a right granted it by its charter by the terms of the section of the General Laws above quoted. It is briefly this, that it has the right to destroy the private property of citizens, by fire, right and left, along the line of its railroad, without making compensation to the owner thereof, provided only it be free from negligence in the operation of its locomotive engines. The general law does not in "unmistakable terms" confer

this right. Does the right to employ steam do so "by an implication equally clear?" Is there anything in the words "convey—by force of steam," which implies that the company shall not be liable for injuries resulting to other persons from this use of steam? It might be said that the right to use steam implies the right to generate it by fire, but does the right to use steam necessarily imply the right to scatter sparks and fire-brands broadcast throughout the land to the infinite danger of property, public and private, and to do this without liability therefor? Would not such a right, if granted, be itself unconstitutional, on the very ground that the plaintiff in error claims the act in question to be invalid, to-wit: because depriving persons of property "without due process of law?" Clearly the grant meant and means nothing more than this, that the railroad company might use steam as a motive power, subject to the laws of the State as then were, or thereafter might be, in force.

This grant to the corporation only conferred upon it, as an artificial person, the right which any private citizen possessed without legislative act. As has been well said: "One striking difference between the artificial and a natural person is that the latter can do anything not forbidden by law, while the former can do only what is so permitted. Its powers and immunities depend primarily upon the law of its creation. Beyond that it is subject, like individuals, to the will of the law-making power (Justice Swayne, in Fertilizing Co. v. Hyde Park, 97 U. S. pp. 666-667)." How can a corporation, being clothed with this right to use steam, which a

private person may use in his own right, claim to be relieved of all legislative control in the exercise of the power granted, when the individual remains subject to such control? All private persons have the right to use fire for domestic or business purposes, but in Barbier v. Connally, 113 U. S. 27, and in Soon Hing v. Crowley, *Id.* 703, this court held that persons in the laundry business might be prohibited by law from washing and ironing from ten o'clock at night to six in the morning. If persons in the laundry business, why not "persons" in the railroad business? All that the legislature of the State of Missouri has done has been to re-enact the common law in regard to the liability for the setting out of fires, so far as those operating railroads are concerned. Says Judge Cooley in his work on Constitutional Limitations, ch. 16, p. 710 (6th Ed.): "Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter contract, removed from the sphere of State legislation, and that the charter implies an undertaking, on the part of the State, that in the same way in which their exercise is permissible *at first*, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues. The obligation of the contract by no means extends so far; but, on the contrary, the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due

regulation, protection and enjoyment." As the Supreme Court of Illinois said, in Railroad v. McClelland, 25 Ill. 140, "to hold otherwise would be to say that the legislature might create an *imperium in imperio*."

IV.

History of Act and Judicial Decisions Touching it.

This act was first enacted in Massachusetts in 1840. It was adopted by the Legislature of Maine in 1842; in New Hampshire in 1850; in Iowa in 1873; in Colorado in 1874; in Connecticut in 1881; in South Carolina in 1882; in Missouri in 1887.

In all of these States it has been enforced by the highest judicial tribunals, as shown by the citations in our brief, and the excerpts from opinions which we append hereto. It has been variously held to be a valid exercise of the police powers of the State, and to be legislation merely remedial in its character.

Railroad companies have the power to take a narrow strip of land from each owner, without his consent, along a route, throughout the extent of a State, selected by it for its track, and to traverse the same at all hours of the day and night, and in all seasons, whether wet or dry, with locomotive engines that scatter fire along the margins of the land not taken, thereby exposing the crops, the property and homes of the citizens along the route to the ravages of that dread element, which they have in no way contributed toward setting loose, and regardless of the vigilance they might exercise? Whether, to re-

cover damages therefor, the burden of proving negligence be upon the citizen, or, as in some States by statute, the burden be shifted on to the railroad company to exonerate itself from the charge of negligence, the remedy available to the citizen has been equally ineffectual. The citizen can ordinarily not sustain the burden. He often cannot show what particular train set out the fire; he has no means of inspecting the construction of the locomotives, and if he had would not know where to look for a supposed spark arrestor, and he is in ignorance as to what constitutes proper management of a locomotive engine. The railroad company on the other hand has all the means for its defense at its command; its proofs can rarely be overcome. It has been the experience of every practicing railroad lawyer that in no class of cases can a railroad company make so impregnable a defense, as in no class of cases have juries been so prone to disregard all evidence and instructions of law, and follow the dictates of natural justice by placing the liability in accordance with that inate principle, and old common law maxim, that where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who occasioned the injury, rather than upon the one who had no agency in producing the damage. And the statute here attacked simply returns to this old principle of the common law which the Acts of Parliament in England of 6 Anne, ch. 31, and 14 Geo. III., ch. 78 repealed with respect to the absolute liability for fire accidentally set out. So much for the act as a remedial measure. As an exercise of the police

power of the State we point to the language of this court in Beer Co. v. Massachusetts, 97 U. S. 25, where it is said (p. 33): "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and *property* of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

Respectfully submitted,

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GARLAND POLLARD,
Of Counsel.

APPENDIX.

Extracts from Opinions Sustaining Act in Question.

Matthews v. *St. L. & S. F. Ry. Co.*, 121 Mo. 298-315:

"It had not been anticipated to what extent engines would destroy the crops and property along the road, but when it was demonstrated that it was a common occurrence, that the company had a right to run its trains at all times of day and night, and that the injured party was powerless often to show negligence, on account of his inability to show what particular train had set out the fire, or the particular cause of the fire, and because the owner was entirely innocent in the premises of any negligence, it was determined by the legislature that when one of two innocent parties must suffer, the one who operated the dangerous agency should suffer the loss."

"Notwithstanding the great weight of authority that such an act is within the police power of the State, the defendant challenges it here. We are, however, not impressed with its reasons to the contrary. If the State is powerless to protect its citizens from the ravages of fires set out by agencies created by itself, then it fails to meet one of the essentials of good government. Certainly it fails in the protection of property. The argument of the defendant, reduced to its last analysis, is this: The State authorized railroad companies to propel cars by steam. To generate steam they are compelled to use fire, therefore they can *lawfully use* fire, and as they are pursuing a lawful business, they are only liable for negligence in its operation; and when in a given case they can demonstrate they are guilty of no negligence, then they cannot be made liable. To this the citizen answers: I also own my land lawfully. I have the right to grow my crops, and erect buildings on it and at any place I choose. I did not set in motion any dangerous machinery. You say you are guiltless of any negligence. It results, then, that the State,

which owes me protection to my property from others, has chartered an agency, which, be it never so careful and cautious and prudent, inevitably destroys my property, and yet denies me all redress. The State has no right to take or damage my property without just compensation."

"It may be remarked that in the grant to defendant it is *nowhere imperatively required and compelled*, as argued by counsel, to use steam. Its charter *permits* it 'to convey persons by the force of steam, *or animals or by any mechanical power*.' To charge that the legislature ever intended by this grant to authorize defendants to destroy the property of the adjoining landowners by the use of fire, and deny them redress therefor according to the well-settled principles of the common law, as evidenced by numerous decisions, both in England and in the highest courts of this country, would be an imputation upon their sense of justice, and contrary to the ordinary rules of construction of such grants (p. 320)."

Campbell v. *Mo. Pac. Ry. Co.*, 121 Mo. 340-345:

"It may not be out of place here to take the occasion of stating that, in my opinion, the statute can be sustained on the broad ground that it is merely remedial in its character, and is authorized under the general powers of the Legislature to provide appropriate remedies for the redress of such wrongs as are contemplated." "The remedy does not alter the contract or the tort; it takes away no vested right; for the defaulter can have no vested right in a state of the law which left the injured party without, or with only a defective remedy. Endlich on Interpretation of Statutes, Sec. 285."

"It is unquestioned that the utmost diligence and care cannot prevent the escape of fire from locomotive engines. We have, then, this condition of things. The corporation is given the right, by the statute, to run its engines by steam power, necessitating the use of fire. Fire necessa-

rily escapes, and is scattered along the route. The citizen owns property on the line of the road, which is exposed to fire from those engines, regardless of the care and vigilance he may exercise. Both parties are faultless, but, nevertheless, the property of the owner is consumed by fire from an engine. The property owner has the right to own the property, and to claim protection under the law, equal at least to the right of the corporation to use fire on its engines. The loss must necessarily fall upon one or the other of these parties. Which one of them shall suffer the loss, the one through whose agency the damage was caused, though in the lawful use of his property, or the one equally innocent of wrong, and who had no agency in causing the damage? Tested by the rule of natural right and equity, there could be but one answer to this inquiry. This answer is formulated into the maxim that 'every one should so use his own property as not to injure that of his neighbor.' "

"We think there can be no doubt that the State has the power to impose absolute liability upon one causing loss of property to another, by the use of agencies necessarily destructive, and in the use of which absolute control is impossible, whether the one using the agency be a private person or a coporation (p. 347)."

Lyman v. *Boston & Worcester R. R. Co.*, 4 Cush. 288-291:

"We consider this provision of the statute of 1840, chapter 85, as one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the locomotive engine. The right to use the parcel of land appropriated to a railroad does not deprive the Legislature of the power to enact such regulations and impose such liabilities for injuries suffered from the mode of using

the road, as the occasion and circumstances may reasonably justify."

Pratt v. *Atlantic & St. Lawrence R. R. Co.*, 42 Me. 579-587:

"The statute under which this suit is sought to be maintained is one of those remedial acts assigned for the protection of property peculiarly exposed by the introduction of the locomotive engine, operated by means of fire, and applies to corporations which obtained their charter before its enactment."

Hooksett v. *Concord R. R.*, 38 N. H. 242-244:

"The extraordinary use of the element of fire, by which the property of individuals situated along the lines of railroads becomes endangered beyond the usual and ordinary hazard to which it is exposed, no doubt caused the Legislature to interfere and impose the liability which is fixed by the statute. By this exposure an increased risk of loss of property is caused. This risk must be borne by some one, and if the property is insured a larger premium must be paid. Upon whom shall this risk fall and this burden rest? Upon the owners of the property or upon the corporations who make this extraordinary use of the fire? Such was probably the question before the Legislature, and we think it was their intention to place the responsibility and burden upon the corporations. We think, also, it was their intention to give the owners a complete indemnity for the loss of all property that might be reasonably be said to be exposed to danger."

Grissell v. *Housatonic R. R. Co.*, 54 Conn. 447-461:

"It is a mistake to suppose that it necessarily transcends the limits of valid legislation, or violates the principle of a just equality before the law, if the one using extra hazardous materials or instrumentalities which put in jeopardy a neighbor's property, is made to bear the risk and pay the

loss thereby occasioned, if there is no fault on the part of the owner of the property, even though negligence in the other party cannot be proved. If the statute should make the owner of a vicious domestic animal liable for the damage it might occasion, without proof of *scienter* or knowledge of its vicious propensity, as required by the common law, we do not think the act would be void. Such a statute would only be a new application of an ancient common law principle, that where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who causes the loss, rather than upon the other who had no agency in producing it, and could not by any means have avoided it.

An ancient statute of this State, which has been very often enforced, makes the owner of dogs, or, if the owner is a minor or apprentice, the parent, guardian, or master, liable for all the damage done by them, irrespective of any fault or negligence on the part of the owner (Gen. St., p. 267, Sec. 5). Another statute (Gen. St., p. 489, Sec. 6) makes one who kindles a fire on his own, or any, land, liable for all damage it may do if it runs upon the land of another, and proof of negligence is not required. We are not aware that the validity of any of these statutes has been called in question. The dangerous character of the thing used is always to be considered in determining the validity of statutory regulations fixing the liability of parties so using it. Fire has always been subject to arbitrary regulations, and the common law of England was more severe and arbitrary on the subject than any statute. In Rolle's Abridgement (Action on the Case B. tit. 'Fire') it is said: 'If my fire, by misfortune, burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbor's house, he shall have his action on the case against me. So, if the fire is caused by a servant or a

guest, or any person who entered the house with my consent; but otherwise if it is caused by a stranger who entered the house against my will.' "

Martin v. *N. Y. & N. E. R. R. Co.*, 62 Conn. 331-339:

"Experience demonstrated that in all cases of fire set by the operation of railroads it was extremely difficult, and in some cases impossible, to prove negligence even where it existed. That fact led the Legislature in 1875 to enact what is now section 1096, making the fact of the fire so communicated *prima facie* evidence of negligence. Even then the difficulty was but partially removed, for in most cases the defendant could easily prove due care and the plaintiff would be illy prepared to meet it. So, in 1881, the Legislature took the broad, equitable ground that upon proof of the fact that the locomotive communicated fire to and destroyed property the company should be liable, irrespective of the question of negligence. The reasons underlying this legislation are not hard to find. The railroad companies were in possession of great powers and privileges granted by the State. The use of such powers was necessarily attended with danger to property along the line of the road and fires were of frequent occurrence. The Legislature rightly judged that it was hard for individuals to bear all these losses, and that the railroad companies might well be required to make them good. Nor is such a requirement unjust. On the contrary, it is substantially right and just. Railroad companies possess extensive powers and valuable franchises, by means of which they are able to collect large sums of money from the public. In using such powers and franchises they necessarily expose private property. They have a license from the public to carry on extensively a dangerous business from which they receive large profits. Why should they not be required to assume the risk rather than the individuals?"

"But in reality the risk is not wholly nor largely on them. They have the means of protecting themselves by insurance. That is a privilege expressly conferred by the statute. But more than that, they have the means of indemnifying themselves, to some extent at least, by increased rates for passengers and freight. Presumptively they adjust their tariff of charges in view of this liability. If they do so, the loss falls ultimately upon the public. We are told that railroads are of incalculable benefit to the public. True. And the public is willing to tax itself in this indirect method for the purpose of paying these losses. Why should the railroad companies complain?"

"In this view of the case the statute rests upon broad grounds of justice and equity. It is designed to do justice where before there was a partial failure of justice. It is therefore a remedial statute in the best sense, and we must so construe it as to suppress the mischief and advance the remedy."

Union Pac. Ry. Co. v. *De Busk*, 12 Col. 294-308:

"We are not aware that the Supreme Court of any State having an act like ours has declared the same unconstitutional. We come to the conclusion that such statutes are not penal, but purely remedial in their nature, that they apply to corporations which obtained their charters before as well as since their passage; that they should receive from the courts a reasonable and liberal interpretation and construction, such as will justly promote their object. By many courts the warrant for their enactment is ascribed to the police power of the State, but we have not found it necessary to attempt a particular classification in order to sustain their validity." * * * "The adoption of the statute in this and other States making railroad companies liable for damages by fire caused by the operation of their locomotive engines, is but the re-enactment *pro tanto* of the ancient common law for the better protection of prop-

erty exposed to such unusual dangers. Such matters are peculiarly within the control of the local Legislatures, and such laws may be enacted, changed or repealed to suit the varied conditions and circumstances of the people. Human laws are at best largely experimental, and especially in all free States we may expect frequent changes as the wants and necessities of the people may require, or as their experience and judgment may suggest."

McCandless v. *Richmond & D. R. Co.*, 38 S. C. 103-114:

"After all, what is the controlling motive in this legislation? It certainly is not animosity against railroads. Look at the facts underlying the exercise of this principle of law. The constitution and laws of every well-regulated community secure the enjoyment to every one of life, liberty and property. A man owns property through which, or near by the place where, a railroad is constructed. The property of the man is destroyed by the fire communicated to the same by the railroad company. One man has lost his property through no carelessness of his own, and the railroad has destroyed that property through agencies necessary to the conduct of its business. The property of the citizen destroyed was not in the way of the proper conduct of the railway's business, but the fire set to it by the railroad company was while such property was off of it its roadbed. Now under all those circumstances, who shall suffer? In Danner v. Railroad Co., 4 Rich. Law, 329, which was a case for negligence, and of course differs in that particular from the case at bar, the court ruled the law in this State to be that, upon the proof by the plaintiff of the killing of his cattle by the railroad company, it was then incumbent on the railroad company to rebut by its proof the charge of negligence. This section goes only a step further by holding the railroad company responsible for injuries to the rights of others, resulting from agencies

set in motion by it, and which had escaped from the railroad's control, so as to work an injury to the property of another, while such property was on its owner's premises. The charge that this section takes the property of another without due process of law cannot be successfully maintained. Here there is no reference to the taking of the property of another. There is no compulsion used to this railroad to allow the fire of its engine to escape and burn up the property of another, but rather it incites care to prevent that result by providing a penalty for a failure to do so. Granted that the result is the payment of damages for the injuries aimed to be suppressed by this legislation, still it is only the result. No legislative provision vests the money of the railroad in the owner of property destroyed by the railroad. Nor do we see how it denies to this railroad the equal protection of the law. Nor, from what has been already said herein, is there any ground to imply an impairment of the obligation of the contract. These matters are somewhat involved in the decision of the United States Court in the case of Railroad Co. v. Gibbes, *supra*, and were all decided adversely to the railroad."

Rodemacher v. *Mill. & St. P. R. Co.*, 41 Iowa, 297-308:

"Our constitution provides that private property shall not be taken for public use without just compensation. Yet, the very law under which defendant is incorporated, authorizes the incorporation of railways, and the employment of a species of locomotives which experience has proved is very destructive to private property. The constitutional right to do so has never, as we are aware of, been questioned, and it would startle the legal mind if it should be questioned at the present day. If, then, the Legislature may authorize to be put in force a power which, in some instances and under some circumstances will cause damage to private property, why may not the

Legislature also say that the person who employs that force shall be answerable for the damages which it occasions? The statute simply recognizes the doctrine that the use of the locomotive engine is the employment of a dangerous force; that sometimes, notwithstanding the exercise of the highest care and diligence is will emit sparks and cause destructive conflagrations; that when this occurs loss must fall upon one of two innocent parties; that heretofore that loss has been borne by the owner of the property injured; hereafter it shall be borne by the owner of the property causing the injury. In *Com.* v. *May*, 26 Iowa, 240, we held, under a statute of this State, that the person who, at a certain season of the year, places out fire upon his own premises and allows it to escape, is absolutely liable for the injuries occasioned. Although that case was twice argued before us, counsel did not even suggest a doubt as to the constitutionality of the law. In 1840 a statute was passed in Massachusetts in all respects similar to ours, except that it gives the railroad corporation an insurable interest in the property for which it may be held responsible in damages. Statutes 1840, Chapter 85. In Lyman v. The Boston & Worcester Ry. Co., it was enforced against a railroad established before its passage. The question of its constitutionality was not raised.

"What the policy of this legislation may be, experience alone can show. It may be that it will prove to be unreasonably severe, and to stand in the way of material progress and the best interests of the country at large. It may, upon the other hand, promote a high degree of care and skill, and stimulate the invention and use of improved appliances, lessening the danger of fires, and greatly increasing the safety of property, without any detriment to public interests. With these questions we have nothing to do. For us it is enough to know that the statute contravenes no constitutional provision, state or national, and that it does not do so we entertain no doubt."

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
Plaintiff in Error,
vs.
LEONARD MATTHEWS,
Defendant in Error.

No. 105.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

PERCY WERNER,
Attorney for Defendant in Error.

GARLAND POLLARD,
Of Counsel.

CENTRAL LAW JOURNAL CO., ST. LOUIS.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

I.

The Constitution of Missouri reserved the right to amend the charter of plaintiff in error.

Art. 8, sec. 4, of the Constitution of Missouri of 1865 is as follows, viz:

"Corporations may be formed under general laws, but shall not be created by special acts except for

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
Plaintiff in Error,
vs.
LEONARD MATTHEWS,
Defendant in Error.

No. 105.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

I.

The Constitution of Missouri reserved the right to amend the charter of plaintiff in error.

Art. 8, sec. 4, of the Constitution of Missouri of 1865 is as follows, viz:

"Corporations may be formed under general laws, but shall not be created by special acts except for

municipal purposes. All general laws and special acts passed pursuant to this section may be altered, amended or repealed."

Plaintiff in error was incorporated in September, 1876 (see Rec., p. 36). Section 7th of the articles of incorporation is as follows, viz (Rec., p. 37):

"Section 7th. This association is organized under chapter thirty-seven (37) of *Wagner's Statutes of Missouri*, entitled, 'Of corporations, private.'"

Wagner's Statutes of Missouri, referred to in the charter of plaintiff in error, consisted of a compilation under the Constitution of 1865, published originally in 1870, a second edition appearing in 1872.

The next Constitution of Missouri, after 1866, was adopted in 1875.

The power granted railway corporations "to take and convey persons and property on their railroad, by the power or force of steam, or of animals, or by any mechanical power, and to receive compensation therefor," was one of the enumerated powers in the General Laws of 1866 (General Statutes of Missouri, 1865, chap. 63, sec. 2, par. VI), and is the same in the Wagner Statutes. (See chap. 37, Wagner's Statutes of Missouri, 1870 or 1872.)

We insist, therefore, that even if there can be read into the charter contract, in defiance of the rule of strict construction, the right to destroy private property by fire in the operation of locomotives, without making compensation therefor to the owners thereof (a continuous taking of private property for public use, as it were), the Constitution of 1865 expressly reserved the right to alter and amend the charter.

II.

The statute of 1887, imposing absolute liability for damage by fire communicated by the locomotives of railway companies, is a valid exercise of the police power of the State. It is true this power is generally exercised by way of regulations, with penalties attached for the violation thereof, but it is not indispensable that the exercise should take that form; and whether a particular statute is passed in the exercise of such power must be determined rather by the subject-matter than by the form of the act.

Section 5 of Article 12 of the Constitution of Missouri of 1875 is as follows, viz:

"The exercise of the police power of the State shall never be abridged *or so construed* as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the State."

Section 14 of the same is as follows, viz: "Railways heretofore constructed, or that may hereafter be constructed, in this State, are hereby declared public highways, and railroad companies common carriers. The General Assembly shall pass laws *to correct abuses* and prevent discrimination and extortion, etc."

III.

The act of 1887 can be sustained as a remedial statute, and is of the same order as Lord Campbell's Act, now so universally adopted by the States, and the Fellow-Servant Act of Kansas, which has been sustained by this court.

IV.

The act in question but re-enacts the common law, *pro tanto*.

Rolle's Abridgment (Action on the Case, B. Tit. "Fire").

Viner's Abridgment (2d Ed. London, 1791), p. 215, [B] "For Fire."

By statute of Missouri "the common law of England, and all statutes and acts of Parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnent to, or inconsistent with, the Constitution of the United States, the Constitution of this State, or the statute laws in force for the time being, shall be the rule of action and decision in this State; any law, custom or usage to the contrary notwithstanding."

Rev. Stat. of Mo. 1889, chap. 98, sec. 6561.

This was originally adopted by the Territorial Assembly in 1816.

Lindell v. McNair, 4 Mo. 382.

The common law with respect to the absolute liability for damages by fire was not changed by acts of Parliament until long after the fourth year of the reign of James I.

See Acts of Parliament 6 Anne, chap. 31, and 14 Geo. III., chap. 78.

All of which is respectfully submitted.

PERCY WERNER,
Attorney for Defendant in Error.

GARLAND POLLARD,
Of Counsel.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 113.

[redacted] RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

[redacted], ADMINISTRATOR, OF ALLEN C. CAMPBELL, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JUNE 8TH, 1896.

(15,627.)